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Beneath the American Flag: United States Law and International Principles Governing the Covenant Between the United States and Commonwealth of the Northern Mariana Islands

Jennifer C. Davis

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**Stangvik v. Shiley and Forum Non Conveniens Analysis: Does A Fear of Too Much Justice Really Close California Courtrooms to Foreign Plaintiffs?**

*Emma Suarez Pawlicki*

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The Court next states that its unwillingness to regard the petitioner’s evidence as sufficient is based... on the fear that... [petitioner’s] claim would open the door to widespread challenges... [i]taken on its face, such a statement seems to suggest a fear of too much justice.¹

U.S. Supreme Court Justice William J. Brennan, Jr.

I. INTRODUCTION

Consider: A Mexican business owner, with a facility located forty miles across the border from California, is a supplier for one of the local maquiladoras.² The business owner spent a considerable amount of the company’s profits upgrading his own production line by installing computer technology designed and manufactured in the United States. With the North American Free Trade Agreement (NAFTA)³

2. Maquiladoras are foreign-owned assembly plants found close to the U.S-Mexican border. See Joel Millman, Mexico, U.S. Near Tax Deal on Maquiladoras, WALL ST. J., Oct. 29, 1999, at A15 (reporting that the United States and Mexico are on the verge of agreeing on an interim plan to deal with future taxation of maquiladoras).
3. See North American Free Trade Agreement, December 17, 1992, U.S.-Mex.-Can., available in WESTLAW, NAFTA database [hereinafter NAFTA]; see also CAL. ST. WORLD TRADE COMM’N, NAFTA: PRELIMINARY ASSESSMENT OF THE AGREEMENT’S IMPACT ON CALIFORNIA 3 (1997) (assessing the impact of NAFTA on California, and summarizing the trade agreement as follows: NAFTA is a comprehensive trade agreement that enhances virtually all aspects of business within North America. Eventually, NAFTA will eliminate tariffs completely and remove many non-tariff trade barriers such as import licenses, which have helped to exclude US goods from the Mexican and Canadian markets. The Agreement ensures that investment will not be coerced by restrictive government policies and that US investors receive treatment equal to domestic investors in the signing nations. NAFTA also includes the best intellectual property provisions ever negotiated by the United States).
and the gradual elimination of tariffs making it cheaper and less cumbersome to purchase computer technology, the hypothetical business owner can afford to buy computer software from some of the top U.S. producers located in California. Without warning (perhaps due to a dormant Y2K-related problem), the computer system that the Mexican business owner has come to depend on, malfunctions and injures one of his employees or destroys some of the company’s property.

The Mexican business owner wants to sue the software manufacturer in California. After all, the defendant is a corporation doing business in California. Evidence regarding the design and development of the software is located in California. California is Mexico’s neighbor, and geographically accessible to the plaintiff. Furthermore, traveling and conducting a trial away from home is an inconvenience the Mexican plaintiff is willing to accept.

From a public policy perspective, California may have an interest in seeing that a corporation doing business in the state not be manufacturing and selling products that may end up hurting its taxpayers. This would be true even if the problem first manifest itself abroad. Considering that NAFTA makes it easier for California technology companies to do business across the border, seeking redress in California for the damages caused by its multi-national corporate residents should not be an unreasonable extension of this new trading relationship. Therefore, a request that California serve as the forum for the hypothetical technology-related claim is both appropriate and reasonable.

Yet, just as California businesses are increasing their trading relationships with Mexico, courts in the state may be less inclined to serve as a forum for claims.

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5. Ryan G. Anderson, Transnational Litigation Involving Mexican Parties, 25 ST. MARY’S L.J. 1059, 1059-60 (1994) (noting that “with the ratification of . . . NAFTA, interaction and cooperation between the United States and Mexico should grow more than ever . . . . Unfortunately, the increased interaction will likely result in a significant increase in litigation involving parties in both sides”); see also Karolyn King, Note, Open “Borders”—Closed Courts: The Impact of Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1114 (1994) (explaining that, when NAFTA removed “the last vestiges of the ‘border’ as a barrier to trade and officially created the largest trading block in the world,” it also created “unique challenges for national legal systems and the courts which preside over them”). See generally, Spencer Weber Waller, A Unified Theory of Transnational Procedure, 26 CORNELL INT’L L.J. 101 (1993) (arguing that due to the “tidal wave of [transnational] litigation sweeping down on both state and federal courts” a manual for transnational litigation should be developed).

6. See Daniel B. Moskowitz, New Legal Statutes Bring Influence to Past and Pending Cases, WASH. POST, Dec. 30, 1991, at F13 (reporting that after the Stangvik decision “[j]udges worried about court congestion can tell foreigners to go home”); see also Robert C. Casad, Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens, 7 TUL. L. REV. 91, 107 (1999) (assessing the contemporary application of jurisdictional analysis in American courts, and noting that “[f]oreign plaintiffs who choose to bring their suits on foreign-based causes of action in the United States are increasingly likely to be unable to do so” due to application of forum non conveniens doctrine); Comment, Forum Non Conveniens, A New
Thanks to the common law doctrine of forum non conveniens, a corporate defendant that is a California resident can argue to a trial court that California would be an inconvenient forum for a claim. California is one of only a handful of states that has codified the forum non conveniens doctrine. In California, courts have discretion to stay or dismiss an action, even if jurisdiction and venue are proper, if the court "finds that in the interest of substantial justice an action should be heard in a forum outside this state." Since the California forum non conveniens statute provides no specific criteria for application of the doctrine, California courts are left

Federal Doctrine, 56 YALE L.J. 1234, 1234 (1947) [hereinafter Comment] (reporting that non-resident defendants' reaction to state courts' expansion of personal jurisdiction over them was to increasingly employ the doctrine of forum non conveniens); see also Recent Case: Products Liability—Forum Non Conveniens—California Supreme Court Rejects Consideration of the Favorable Law of a Foreign Plaintiff's Chosen Forum as an Element in Forum Non Conveniens Analysis, 105 HARV. L. REV. 1813, 1817 (1992) [hereinafter Recent Case] (reporting on the impact of Stangvik v. Shiley on foreign plaintiffs).

7. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 337 (3d ed. 1999) ("Forum non conveniens is a judge-made principle of common law that permits a court at its discretion to refuse to adjudicate a case properly within its jurisdiction on the grounds that . . . another state's or country's court would be a fairer place to hear the case."); see also Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 COLUM. L. REV. 1, 1 (1929) (introducing the forum non conveniens doctrine as a means to limit access to American courts on the grounds of inconvenience, even though jurisdiction is otherwise proper). Blair's article is generally credited as introducing the concept into mainstream American jurisprudence by arguing that courts had the power to apply the doctrine without statutory authority. Forum non conveniens "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Id.

8. The fact that a Mexican plaintiff suing an American corporation in the defendant's forum state may still face a dismissal of his claim on a forum non conveniens motion led at least one law professor to note that "[i]f I represented any Mexican plaintiff[s] . . . I would want to tag along with a plaintiff who was a United States citizen, preferably [a citizen from the forum state]." Id. See Symposium, Part Five: A Serious Accident Occurs in the Mexican Plant: Problems of Corporate and Product Liability, 4 U.S.-MEX. L.J. 125, 137 (1996) [hereinafter Symposium] (discussing jurisdictional and substantive law issues during a panel discussion held at the 4th Annual Conference of the United States-Mexico Law Institute); see also Casad, supra note 6, at 107 (suggesting that modern jurisdictional analyses misapplies the "minimum contact" test developed by the U.S. Supreme Court in International Shoe by focusing on the minimum contacts test as the starting point of a discussion whether it is fair to exercise jurisdiction over a defendant, not the end of the analysis). "Since the Piper Aircraft case, courts have increasingly declined to hear products liability suits brought by foreign plaintiffs against American manufacturers for product injuries sustained abroad." Id. at 106; see also Jacqueline Duval-Major, Note, One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff, 77 CORNELL L. REV. 650, 670 (1992) (analyzing how the implementation of the forum non conveniens doctrine at the federal level may unjustifiably protect multi-national corporations from any liability). "Although this type of litigation varies somewhat, it generally involves an individual's personal injury claim for an accident in a foreign country due to a defendant [multi-national corporation's] product or service. A defendant can prevent progression of a case at an early stage through a forum non conveniens dismissal." Id. See also Russell J. Weintraub, International Litigation and Forum Non Conveniens, 29 TEX. INT'L L.J. 321, 322 (1994) ("When a defendant is sued in the United States for injuries suffered abroad, a major defense tactic is to seek stay or dismissal of the action under the doctrine of forum non conveniens.").

9. See Weintraub, supra note 8, at 344 n.188 (noting that "[t]here are nine states plus the District of Columbia and the Virgin Islands that have general statutory or rule provisions concerning forum non conveniens"). The states include: Arkansas, California, Indiana, Massachusetts, Michigan, New York, Pennsylvania, Texas, and Wisconsin.

10. CAL. CIV. PROC. CODE § 410.30(a) (West 1973).
to decipher when it is appropriate and "in the interest of substantial justice" to
dismiss a case due to inconvenience.11.

The California Supreme Court officially adopted the doctrine in 1954 in *Price v. Atchinson, Topeka & Santa Fe Ry. Co.* 12 The *Price* court articulated the doctrine as including a series of public and private factors that the courts should consider.13 The list was borrowed from the U.S. Supreme Court decision in *Gulf Oil Corp. v. Gilbert.* 14 California courts have decided whether or not they should serve as a forum to engage in a factor-balancing exercise.15 Subsequent court decisions16 and statutory absorption17 expanded the list of factors for California courts to consider from those originally found in *Gulf Oil.*

In its application, the forum non conveniens doctrine requires the courts to engage in a multi-factor analysis: weighing one against the other, in search of the proper balance that points to justice.18 Any given combination of these factors could lead the court to determine that the forum was inconvenient, even though

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12. *Price v. Atchinson, Topeka & Santa Fe Ry. Co,* 268 P.2d 457, 460 (1954) [hereinafter *Price*] (holding that California courts can apply the forum non conveniens doctrine to dismiss cases). For a complete discussion regarding the evolution of the doctrine in California, see *discussion infra* Part III.
13. *See id.* at 461–62 (adopting by reference the public and private factors the U.S. Supreme Court considered in dismissing a claim under the forum non conveniens doctrine, as found in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947) [hereinafter *Gulf Oil*]). For a more complete discussion regarding the evolution of the doctrine in federal courts, see *discussion infra* Part II.C.
14. *Gulf Oil,* 330 U.S. at 507–09 (1947) (holding that federal courts have the discretion to dismiss a case on forum non conveniens grounds, and outlining the public and private factors courts should balance); *see also* *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 259–61 (1981) [hereinafter *Piper*] (adding dimension to the factors by holding that the fact that the law in the alternative forum would be less favorable than that in the forum chose by the plaintiff had less weight when the plaintiff is non-national).
15. *See* Cal-State Bus. Prod. & Serv. V. Ricoh, 16 Cal. Rptr. 2d 417 (1993) (holding that forum selection clauses are enforceable even if it means increased inconvenience to the plaintiff). "There is a 25-factor analysis to guide the trial court in its resolution of the issue, which is not to be disturbed absent an abuse of discretion." *Id.; see also* BENDER, *CALIFORNIA TORTS* § 71.24 (2000), available in LEXIS, California Torts file (listing 23 factors). For a more complete discussion regarding these factors, see *infra* Part III.
16. *See Hemmelgarn v. Boeing Co.,* 165 Cal. Rptr. 190, 194–95 (1980) (listing twenty one "primary factors" previous California courts thought important to consider when deciding a forum non conveniens motion to dismiss); *see also* *Great N. Ry. Co. v. Super. Ct. of Alameda County,* 90 Cal. Rptr. 461, 466 (1970) [hereinafter *Great Northern*] (noting that "[s]everal authorities have announced legitimate factors to be considered by the court in determining whether the doctrine of forum non conveniens should be applied. We set forth a composite of these considerations").
17. *See* CAL. CIV. PROC. CODE § 410.30(a) (West 1973) (Judicial Council Comments) (listing 13 forum non conveniens factors, and referring to Wisconsin’s forum non conveniens statute for four additional factors).
18. *See generally* *Great Northern,* 12 Cal. App. 3d at 110 (stating the rules for forum non conveniens factor balancing analysis to ensure justice). The court stated:

Whether or not *forum non conveniens* shall be applied rests in the sound discretion of the trial court. Unless the balance weighs strongly in favor of the defendant, the plaintiff’s choice of a forum will rarely be disturbed. Nevertheless, the exercise of such discretion may not be arbitrary; it must be exercised in conformity with the spirit of the law and in a manner to subserve and not impede the ends of substantial justice. Where the balance does weigh heavily in a defendant’s favor it becomes the court’s duty to apply the doctrine.

*Id.*
jurisdiction existed over the defendant. This multi-factor balancing approach gives the parties substantial opportunities to argue which factors deserve more weight. Unfortunately, it also generated court decisions that, at a minimum, were of little precedential value for lawyers and students alike, and at worst, inconsistent.20

In its 1991 decision in Stangvik v. Shiley, Inc.,21 the California Supreme Court tried to address some of these problems by outlining a framework for forum non conveniens balancing that provided some consistency, while retaining flexibility in its application.22 Some commentators argue, however, that with Stangvik, the California high court engaged in a forum non conveniens factor-balancing analysis that resulted in the court’s departure from the traditional application of the doctrine as a way of ensuring “justice.”23 To them, Stangvik closed the doors of California’s courts to nonresident plaintiffs in search of justice. It also gave resident multinational corporation defendants a carte blanche to engage in tortious activity abroad without any concerns about being tried in the state, and perpetuated old notions of jurisdiction based on territorial boundaries that seem anachronistic in today’s free trade world.24

This Comment explores whether California’s post-Stangvik application of the forum non conveniens doctrine better serves its original equitable roots than may have been previously recognized. It argues that commentators and litigators who focus on the balancing of the private interests of the parties—and not on the doctrine’s dual policy goals of procedural fairness to the parties balanced against judicial administrative concerns—misunderstand and misapply the doctrine. This Comment reviews the role of multi-factor tests in leading forum non conveniens analysis astray. Finally, this Comment suggests that lawyers representing foreign clients must understand how Stangvik, by refocusing forum non conveniens analysis to better reflect the doctrine’s historic roots and the policy behind its codification, does not result in an automatic closing of the doors to California courtrooms.

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19. See id.
20. For more on how multi-step analysis may lead to legal obfuscation, see discussion infra Part III.
22. Stangvik v. Shiley, Inc., 819 P.2d at 16 (stating that in the opinion the court addresses “the appropriate standards to be applied in deciding whether a trial court should grant a motion based on the doctrine of forum non conveniens when the plaintiff, a resident of a foreign country, seeks to bring a suit against a California corporation in the courts of this state”).
23. See King, supra note 5, at 1146 (arguing that the application of the forum non conveniens doctrine should “always remain subservient to [the] principle [of justice]” which “fundamentally concerns people”).
24. See Recent Case, supra note 6, at 1815 (noting that the court’s holding in Stangvik eliminating an alternative forum’s substantive law from the multi-factor analysis is appropriate in situations where courts are being asked to regulate the foreign activities of the state’s corporations). But see King, supra note 5, at 1115 (pointing to the fact that with Stangvik, the California Supreme Court “joined the ranks of the states sending the message: foreigners go home”).
Part II provides a review of the policy origins of the forum non conveniens, first from a European perspective, and then as transplanted to the United States. Part III explores the doctrine's trajectory through the California courts, focusing on its application prior to Stangvik, and how this decision reaffirmed the framework for analyzing the multiple factors considered by California courts facing a forum non conveniens motion. Finally, Part IV suggests an approach for forum non conveniens analysis that may help maximize a foreign plaintiff's opportunity of keeping a claim in a California courtroom.

II. HOW FORUM NON CONVENIENS AFFECTS FOREIGN PLAINTIFF’S CHOICE OF FORUM

Traditionally, a plaintiff's choice of forum has been given great deference by the courts. This presumption holds true in most circumstances if the plaintiff is a resident of the forum state. However, if the plaintiff happens to be similar to the hypothetical Mexican businessman in the Introduction, in California, his choice of forum may come under close scrutiny by the court. Notwithstanding the foreign plaintiff's ability to meet the jurisdictional requirements imposed by California's long-arm statute, corporate defendants could still request that the California court decline to exercise jurisdiction on the grounds of forum non conveniens.

Today, forum non conveniens motions are part of the procedural arsenal of an American manufacturer who is sued in its home state for product liability claims.
arising outside the United States. The doctrine is a welcomed procedural tool for corporate defendants to keep these strict liability claims, which are a "primarily . . . American innovation," from reaching U.S. courtrooms. The common law origins of the tool, though, lay elsewhere. The transcontinental origin of the doctrine and its American evolution are explored below.

A. Forum Non Conveniens Doctrine—Origins

Under the common law doctrine of forum non conveniens, the court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Scholars trace the doctrine to England and Scotland. By the mid-1800s, the term first appeared "to describe what was by then a settled rule in Scottish practice, i.e., trial courts could refuse to hear cases when the ends of justice would best be served by trial in another forum." The doctrine attempted to deal with cases where, even though the court could exercise jurisdiction over a defendant, it would prefer not to do so because all the parties involved were foreigners and the cause of action arose outside the country. So, for example, in the 1866 case Clements v. Macaulay, the court considered whether or not to dismiss a suit under the forum non conveniens doctrine because the case dealt with a business transaction which included two American merchants from Texas. The transaction in dispute was a joint venture that included the two merchants, teaming up with another American citizen, and the then-government of the Confederate States. The venture was to transport cotton out of the South via steamer, and "proceed to Cuba, or some of the West India Islands, and there procure, and return to some port in the State of Texas . . . with a cargo to be composed of Minie muskets . . . quinine, and suitable and proper medicines for the medical department of the army," at the height of the American Civil War. The first leg of the venture

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29. Casad, supra note 6, at 105 (noting that the doctrine is used by American multi-national corporations that are "sued in a products liability action in the manufacturer’s home state by a foreign plaintiff seeking damages for a product injury incurred abroad").
30. Piper, 454 U.S. at 252 n.18.
32. See Blair, supra note 7, at 20 (framing the discussion of applicability of the doctrine by tracing its common-law origins in Scotland and England). Comment supra note 6, at 1235 (explaining that, at the time of the publication of Blair’s article, the doctrine had reached its fullest development in England and Scotland).
34. See Comment, supra note 6, at 1235 (illustrating another example of doctrine application in an English case where the court rejected to assert jurisdiction over an alien domiciled in India against an Indian solicitor, who just happened to be in England when served, over a claim that arose in India).
35. See Clements v. Macaulay, 4 MacPherson (Sess. Cas. 3d Ser.) 583 (1866) (holding that the suit could not be dismissed on a forum non conveniens motion unless defendant can show that another forum is available).
36. Id. at 584.
from Cuba to Texas went well. But the steamship, loaded with cotton, ran into
trouble on its way back to the West Indies, when it was either captured by the
Federal government or burned by the crew to avoid capture. With the loss of the
ship and cargo came the end of the venture, but not the end of the trouble. Believing
that money was still owed to him, Clements, one of the American merchants,
demanded an accounting from his partner Macaulay.

At the time of the action, Clements lived in London. While a Scottish court
asserted jurisdiction over the defendant, the trial court dismissed the case finding
that Scotland was not the proper, or convenient, forum. The Court of Session
reversed the decision, rejecting the defendant’s forum non conveniens “defence.”
In doing so the Scotland Court of Session articulated what it believed were the
general parameters of the doctrine. While recognizing that a court was empowered
to dismiss the case it otherwise had jurisdiction over, the court enunciated that “the
contention involved in such a plea is rather that for the interest of all the parties, and
for the ends of justice, the cause may more suitably be tried elsewhere.”

The court provided an important qualification to the application of the doctrine:
unless the defendant can show that another forum exists that will hear the case, the
court will not act favorably on a forum non conveniens dismissal request. In his
pleading, Macauley admitted that it was highly unlikely that an American court
would enforce a contract that was based on the trafficking of cotton in exchange for
ammunition and medicine to support the Confederate cause. Even though, in
theory, the plaintiff could find a forum for his claim in Texas, the court reasoned
that, in reality, the state’s courts would probably not assert jurisdiction on what
amounted to be an illegal claim. Unless the defendant showed that he was willing
to meet the plaintiff in another appropriate forum, the court concluded that the
“elements for disposing of this defence, pleaded on this, its essential grounds, do
not exist.”

37. See id. at 585 (detailing how the steamship left Cuba and succeeded in running the blockade, arriving
    safely in Texas).
38. See id. at 585 (noting that with the loss of the steamship at sea came the end of the venture).
39. See id. (believing that at least $12,000 remained unaccounted for from the joint venture).
40. See id. at 586. (“[I]n respect of the grounds and nature of this action, and the questions which it
    involves, this is not the proper and convenient forum to entertain and dispose of the cause: Therefore, sustains the
    first plea of law stated for the defender, [and] dismisses the action.”).
41. Id. at 592.
42. See id. (“Apart from the suggestion of Texas, no other suggestion is made, and I know no case of a plea
    of this kind being sustained, where the defender did not satisfy the Court that there is another Court where the
    cause could be tried with advantage to the parties and to the ends of justice.”).
43. See id. at 586 (documenting defendant’s pleadings arguing that “no claim founded on the said joint
    adventure can be enforced in the Courts of this country” since it was illegal).
44. See id. at 594 (rejecting defendants vague references that a court in the United States is more
    appropriate since “defender does not name any one State in whose Courts he is willing an ready to meet the
    pursuer, with the exception of the Court of Texas ... [and] Lordship has conclusively shewn [sic] that there is no
    jurisdiction in the Courts of Texas, on the grounds stated by the defender, to entertain this action”).
45. Id. at 594.
The court also rejected any suggestion regarding whether the plea's potential inconvenience to the court should be would inconvenience the court be part of the analysis. "[T]he question comes to be, whether the inconvenience and unsuitableness of a forum means inconvenience to the Court itself which is to try the questions. If it did, I should dismiss the action at once with the greatest pleasure. But it is not so."  

Therefore, from Clements, a number of key factors regulating the application of the doctrine surfaced. One was that the interests of the parties and the ends of justice are interdependent goals the courts should seek to balance. Another was the presumption that justice cannot be met when dismissal leaves the plaintiff forumless. Finally, the court’s own convenience (or inconvenience) had no operational role in the decision.

It is Clements that the House of Lords cited in one of the most important English cases dealing with forum non conveniens, Société du Gaz de Paris v. Société Anonyme de Navigation “Les Armateurs Français." In Société du Gaz, decided in 1926, the plaintiffs argued that the defendants failed to show that it would be “oppressive and vexatious to try the action in the Court in which it was originally brought." The House of Lords, in affirming the Court of Session’s dismissal of the suit, stated that the lower court erred since “[f]rom the beginning to the end of the case there is not a breath of Scottish atmosphere.”

In Société du Gaz, a French company sued another French concern when the plaintiff’s load of coal was lost off the English coast. The claim between the two French companies ended up before a Scottish court. The House of Lords, adopting the Clements language defining the forum non conveniens plea, went about outlining some of the facts that led it to dismiss the case. Key facts to the court included: both parties were foreigners, the ship in question was a French ship built

46. Id. at 592.
48. See id. at 15 (citing a forum non conveniens standard found in the earlier case Logan v. Bank of Scotland). Whether the standard should consider the defendant’s, and not the court’s, “oppression” or “vexation” is open to interpretation. In Collard v. Beach, 81 N.Y.S. 619, 621 (Sup. Ct. 1903), the justices seemed concerned with the court being “vexed with this particular litigation.” But cf. Comment, supra note 6, at 1236 n.18 (suggesting that early American courts considered whether a foreign suit was brought before a forum “to vex or harass the defendant,” not the court as Collard suggests). The U.S. Supreme Court’s focus seemed to be whether the defendant and plaintiff filed the suit to “vex,” “harass,” or ‘oppress' the defendant.” Gulf Oil, 330 U.S. 501, 508 (1947).
50. See id. at 16 (explaining that the court’s jurisdiction is based on “the pursuers have caused another vessel belonging to the defendants to be arrested within the jurisdiction of the Sheriff Court of Dumbarton, and this is sufficient, according to very old Scots law, to found the jurisdiction of the Court”).
51. See id. (pointing to the opinion by Lord Justice-Clerk Inglis in Clements v. Macaulay as providing a description of the forum non conveniens plea).
in France, the cargo was meant for French ports, the crew members that were lost were all French, the ship was of a particular type that was already under the scrutiny of the French government due to safety issues, and French law allowed for the limiting of liability under certain circumstances, a right the defendants would not have in Scottish court.

The court recognized two facts that, at first glance, argued for proceeding with the case in a Scottish court. First, the charter-party or contract was written in English, and second, the witnesses to the accident were English residents. The court dispensed with the first fact noting that the charter "appears to be in common use by foreign owners" and therefore did not suggest that the French courts would have any particular difficulty with it due to familiarity with the instrument.

Regarding the availability of witnesses, the court noted that "their evidence could no doubt be taken in France." This should interest anyone arguing against a forum non conveniens dismissal because as shall be seen in Part III, whether witnesses will be burdened if the trial proceeds in the forum is one of the key pieces of information that factors in favor of a forum non conveniens-based dismissal. Arguably, seventy five years ago, transportation and communication means were less reliable than today. It is interesting to note, however, that at least the House of Lords did not think it would be of great inconvenience to the parties if their witnesses had to cross the English Channel to present testimony before a French court.

Lord Shaw of Dunfermline articulated the doctrine in the following manner:

If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of forum which is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties . . . then the doctrine of forum non conveniens is properly applied.

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52. See id. at 17 (pointing to what the court considers to be the relevant facts of the case).
53. Id.
54. Id.
55. Id.
56. See cf. Piper, 454 U.S. 235, 242 (1981) ("Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident—all essential to the defense—are in Great Britain."); Gulf Oil, 330 U.S. 501, 511 (1947) ("[Judge] was justified in concluding that this trial is likely to be long and to involve calling many witnesses, and that Lynchburg, some 400 miles from New York, is the source of all proofs for either side"); Alpha Therapeutic Corp. v. Nippon Hoso Kyoki, No. 98-55642, 1999 U.S. App. LEXIS 33928, at *34 (9th Cir. Dec. 28, 1999) (holding that the court misapplied the forum non conveniens private factors because it fail to "consider the location of the witnesses"); Stangvik v. Shiley, Inc., 819 P.2d 14, 22 (1991) ("[B]ecause virtually all witnesses and documents relating to the decedents' medical care and treatment . . . and all the witnesses to the familial impacts of their deaths are located in Scandinavia, it is more convenient to try the actions there.").
How does this articulation of the doctrine compare to the one in *Clements v. Macaulay*? Both share a concern regarding how the decision will affect the parties. On the other hand, the parties benefit differently under each standard. For example, to the Clements's court, whether the plaintiff had an alternative forum was the determinative issue; without one, the court would find dismissal inherently unfair to the plaintiff. Therefore, the defendant had to convince the court that an alternative forum existed. Lord Shaw's statement in *Société du Gaz* focused on the unfairness that would result if the forum was not dismissed. In doing so he seemed to favor the defendant, because it would be difficult to see how granting the dismissal would be fair to the plaintiff. Perhaps not surprisingly, the Clements's standard, with the burden of proof on the defendant, resulted in the court retaining the case while Lord Shaw's approach resulted in the opposite.

Lord Shaw also identified the "convenience of trial" to the parties as an important factor. Does this mean that if the party is inconvenienced because the court's calendar is crowded that a dismissal is merited? Shaw did not shed much light regarding his meaning. But another member of the court, Lord Sumner, seemed to pick up on Shaw's suggestion that convenience issues relating to trial proceedings should be a factor to consider. In his concurrence, Sumner focused on the difficulty of creating a standard that depends on balancing the "conveniences" of those involved, including those of the court. "Obviously, the Court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involved taking evidence in French, as a ground for refusal." Sumner preferred a forum non conveniens analysis that focused on whether another forum existed that was "more convenient and preferable for securing the ends of justice" and not on the convenience of "the pursuer or the defender or the Court[.]" In this matter, Sumner shared the concern expressed in *Clements* that

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58. See *Clements v. Macaulay*, 4 MacPherson (Sess. Cas. 3d Ser.) 583, 594 (1866) ("When the Court has given effect to such a plea, it has always been because another forum . . . has been regarded as more convenient and preferable to secure the ends of justice.").

59. In his opinion, Lord Shaw reference to "unfairness" to "one of the suitors" likely meant how anyone bound to attend a county court would be affected if the court kept the case, which is a more archaic use of the term suitor. The contemporary use of the word refers to the plaintiff. BLACK'S LAW DICTIONARY 1001 (abr. 6th ed. 1991).

60. Blair notes that the American version of the doctrine at the time of his writing put the burden on the plaintiff to show that if the forum declines jurisdiction, the plaintiff will be without a forum and injustice will result. See Blair, supra note 7, at 33. This still seems to be the case. In *Piper*, once the defendant pointed that an alternative forum, the burden of proof shifted, unsuccessfully, to the plaintiff to prove that the alternative forum was inappropriate because the substantive law was less favorable to the plaintiff. Piper, 454 U.S. at 247. In California, *Stangvik* states that the defendant bears the burden of proof. Stangvik, 819 P.2d at 18. This burden seems to quickly shift to the plaintiff on the issue of the appropriateness of the alternative forum once the defendant consents to jurisdiction in the alternative forum. See *Chong v. Sup. Ct.*, 68 Cal. Rptr. 2d 427, 431 (1997).


62. Id. at 21.

63. Id.
issues relating to the court’s “convenience” should not muddle a forum non conveniens analysis.

Therefore, from the Scottish and English decisions we can trace a number of specific factors that have become part of contemporary forum non conveniens analysis. These factors include: a presumption that an alternative forum must exist before a dismissal is granted and a recognition that unfairness to the defendant means allowing a claim to proceed that was filed in the forum merely to harass or vex the party. In Société du Gaz, the fact that witnesses may have to travel to another forum was not consequential. And in both Société du Gaz and Clements v. Macaulay, we find suggestions that the court’s inconvenience should not be included in a forum non conveniens factor-balancing. 64

B. Forum Non Conveniens Doctrine—Yankee Twist

Notwithstanding Société du Gaz and Clements v. Macaulay, the utility of the doctrine to help manage the court’s crowded docket was not lost to Americans. It would, however, take the bold suggestion by a New York lawyer that the doctrine be considered as “an additional effective method of dealing” with congested calendars for the idea to take off. 65 Prior to 1929, the use of the doctrine of forum non conveniens in American federal or state courts to decline exercising jurisdiction was almost nonexistent. 66 However, requests that the American courts dismiss claims due to inconvenience increased dramatically following Paxton Blair’s 1929 Columbia Law Review article, which introduced the concept to a broad scholarly audience. 67 The article was so influential that “[a]fter this article the use of the term became so general that in 1941 Justice Frankfurter referred to the ‘familiar doctrine of forum non conveniens’ as a civilized judicial system which ‘is firmly imbedded in our law.’” 68

The first line in the article read: “Among the problems engrossing the attention of the Bar in the larger centers of population in the United States, the relief of

64. See Clements v. Macaulay, 4 MacPherson (Sess. Cas. 3d Ser.) 583, 592 (1866) (suggesting that whether the court would be burdened by the claim should not be a factor considered); see also Société du Gaz, [1926] Sess. Cas. (H.L.) at 21 (rejecting any consideration of the courts inconvenience in forum non conveniens dismissal).
65. See Blair, supra note 7, at 1; see also Allan Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781, 811–12 (1985) (giving credit to Blair for introducing the concept into mainstream American jurisprudence).
66. See Blair, supra note 7, at 2 (explaining that the doctrine was “rarely been referred to by name” but suggesting that some American had been applying some of the doctrine’s principles); see also Stein, supra note 65, at 801 (“[F]orum non conveniens was virtually unheard of, outside of admiralty context, prior to 1929.”).
68. Barrett, Jr., supra note 33, at 388 (exploring the evolution of the doctrine in both federal and state courts, including California).
calendar congestion in the trial courts is easily foremost." In order to "[divert] at its source the flood of litigation by which our courts are being overwhelmed," Blair argued that the courts had within their discretion the ability to dismiss cases under the forum non conveniens doctrine. Thus, the first scholarly manifestation of the doctrine in America focused on the benefits that it could provide to achieve judicial economy.

Why did Blair's idea that the doctrine should be used to control the court's docket catch the fancy of judges and lawyers alike? Blair himself suggested that, by late 1800s and early 1900s, American courtrooms were bursting with so much activity that complaints about calendar congestion were becoming common. Blair's concern stemmed from what appeared to be an increased flood of litigation in New York courts even when, for example, the defendant was not a resident of the state and the place where the action arose was elsewhere. Therefore, to Blair, one way of dealing with the burdening effects on the courts of plaintiff forum shopping was by the use of the forum non conveniens doctrine.

The court's overcrowded calendar stemmed from a number of changes in American society impacting the legal system. At the end of the 19th century, a population explosion, the development of a middle class, and the industrial revolution created new demands on the trial courts from industry and commerce, and from an enormous middle class of consumers of law. The courts were overwhelmed. Another obstacle to the smooth administration of justice was the

69. Blair, supra note 7, at 1.
70. Id.
71. See id. (suggesting that the forum non conveniens doctrine is readily available to deal with the flood of litigation drowning the state courts).
72. See id. at n.1 (pointing to a 1928 Harvard Law Review cataloging some of these complaints).
73. See id. at 34 (commenting how calendars become congested and "local taxpayers suffer unjustly").
74. The passage of time has not abated the general concern of plaintiff forum shopping in American courts.
75. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 388 (2d ed. 1985) ("The court system-slow, expensive, relatively technical despite the pruning and reform of generations - could not possibly meet the needs generated by economic and social change.").
76. See id. at 388-89 ("There [were] many complaints that courts could not keep pace with demand. They were fixed in size and limited in staff; legislature simply did not add enough judges and courts to fill the needs. Delays piled up. Litigants had to wait long periods to get their cases tried . . . . There were a great many cases on the dockets.").
judges' own abilities (or inabilities) to deal with the litigation confronting them.\textsuperscript{77} These factors seemed to conspire to make full-scale litigation in America "slow, costly, disruptive."\textsuperscript{78}

An additional explanation for the emergence of the doctrine was that it served as a counterbalance to the enlargement of jurisdictional limits following the U.S. Supreme Court's decision in \textit{International Shoe}.\textsuperscript{79} Others argue that the emergence of the doctrine can be traced to the U.S. Supreme Court's 1877 decision in \textit{Pennoyer v. Neff}, which held that the mere physical presence of a defendant in the forum state at the time he was served was sufficient to establish personal jurisdiction.\textsuperscript{80} It was also seen as a way for the court to accommodate the increased litigation that followed Congressional approval of the Federal Employers' Liability Act (FELA).\textsuperscript{81} The statute, as interpreted by the high court, expanded the number of places a defendant could be sued.\textsuperscript{82}

Probably due to all of the reasons listed above, state and federal courts alike embraced Blair's idea "with the kind of judicial reception that law professors dream of."\textsuperscript{83} This outcome is not surprising if, as suggested by Professor Lawrence M. Friedman in his preeminent history of American law, it is accepted that, by the 19\textsuperscript{th} century, Americans had a utilitarian view of the legal system.\textsuperscript{84} "In this period, people came to see law, more and more, as a utilitarian tool: a way to protect property and the established order, or course, but beyond that, to further the interests of the middle-class mass, to foster growth."\textsuperscript{85} Within this utilitarian notion, Blair's suggestion that a common law doctrine existed that could help relieve

\textsuperscript{77} See \textit{id.} at 389 ("The judges were professional, lawyerly lawyers; there was no guarantee that they would understand the nature of a [for example] business dispute and handle it properly even if the judges had had enough time.").

\textsuperscript{78} \textit{id.}

\textsuperscript{79} See Stein, supra note 65, at 802 ("The same forces of industrialization and modernization that led the courts to reconceptualize personal jurisdiction resulted in an increase in the business of the courts. By the late 1920's, residents of the major urban centers, which had undergone rapid industrial expansion, found their courts extremely crowded . . . [and] in need of a tool to close the courthouse doors.").

\textsuperscript{80} 95 U.S. 714 (1877). See John E. Ryan & Don Berger, \textit{Forum Non Conveniens in California}, 1 PAC. L.J. 532, 533 (1970) (noting that the doctrine developed as an answer to the growing ability of the plaintiff to assert jurisdiction over a defendant in any state where he could be "caught").

\textsuperscript{81} 45 U.S.C.A. § 51 (1999) [hereinafter FELA] (originally authorizing the states to assert concurrent jurisdiction over claims arising under the act). For additional discussion of how passage of FELA impacted the development of forum non conveniens in California, see \textit{infra} Part III.C.; \textit{see also Stein}, supra note 65, at 806-07 (providing additional information on how FELA influenced the development of the federal doctrine of forum non conveniens).

\textsuperscript{82} See Gulf Oil, 330 U.S. 501, 506 (1947) ("The Federal Employers' Liability Act . . . increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice.").

\textsuperscript{83} Stein, supra note 65, at 811.

\textsuperscript{84} Friedman, supra note 75, at 114 (describing how economic and social changes in the 19th Century, American law went through tremendous changes in order to accommodate new legal consumers).

\textsuperscript{85} \textit{id.}
congested court calendars was full of promise. This promising tool got its official legal blessing by the end of the 1940s, when in *Gulf Oil Corp. v. Gilbert*, the U.S. Supreme Court officially adopted the doctrine in federal courts and enunciated a multi-factor test to help guide forum non conveniens analysis.

C. Applying the Doctrine—The Analytical Framework and The Gilbert Factors

In assessing whether to grant a motion to dismiss based on forum non conveniens, federal courts use a number of factors that were first articulated by the U.S. Supreme Court in *Gulf Oil*, and later reaffirmed in *Piper Aircraft v. Reyno*. Both cases stemmed from accidents that occurred outside the forum state. Also, in both cases, the plaintiff was a nonresident of the forum state. Equally, the federal district court in question could assert personal jurisdiction over the defendants. In both cases, the defendants asked that the federal court to dismiss the case pursuant to the forum non conveniens doctrine.

In *Gulf Oil*, the Supreme Court affirmatively asserted that the U.S. district courts have the “inherent power to dismiss a suit” under the doctrine, and that a review of the lower court’s decision would be limited to whether there was an abuse of discretion. To help make this determination, the high court listed a series of factors for consideration. The factors, divided into categories that were identified as the public and private interests in the claim, aimed to answer a very basic question: is this the kind of case the court “may resist imposition upon its jurisdiction even when jurisdiction is authorized[?]”

The Court noted that it was the private interests of the parties that were at the forefront of the balancing discussion. The Court began with the presumption that the plaintiff’s choice of forum should rarely be disturbed, which begs the question, “When should it be disturbed?” The Court answered this question by referring back to the already-familiar terminology that litigating the case in the forum should not

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86. *See Blair*, supra note 7, at 1 (affirming Blair’s conviction than “an additional effective method of dealing with the [court congestion] problem lies in the wider dissemination of the doctrine”).

87. *See Gulf Oil*, 330 U.S. at 507 (noting that federal law contained no expressed criteria to guide district courts in exercising their discretionary power to dismiss by applying the doctrine).

88. *See Piper*, 454 U.S. 235, 261 (1981) (holding that the lower court abused its discretion and misapplied the *Gulf Oil* factors when it failed to dismiss because the alternative foreign forum would apply unfavorable substantive law, to the detriment of the plaintiff); *see also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) (noting the contemporary limited applications of the doctrine in federal district courts because the transfer of venue portion of the doctrine has been codified in 28 U.S.C. § 1404(a), and “to the extent we have continued to recognize that federal courts have the power to dismiss damages actions under the common-law *forum non conveniens* doctrine, we have done so only in ‘cases where the alternative forum is abroad.’” (quoting American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2)).

89. *See Gulf Oil*, 330 U.S. at 507 (“The questions are whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of forum non conveniens and, if so, whether that power was abused in this case.”).

90. *Id.* at 507.
vex, harass, or oppress the defendant. How do we determine whether the forum was selected to vex the defendant? The Court suggested that the factors important in this part of the analysis were: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; (3) the possibility of view of premises where the actionable event occurred; (4) and “all practical problems that make trial of a case easy, expeditious and inexpensive.”

In tune with Blair’s suggestion twenty years earlier that an important and appropriate factor for the court to consider in its forum non conveniens analysis was the administrative burden the claim imposes on the court, the high court identified a number public interests the court should look into, including: (1) the administrative difficulties flowing from court congestion; (2) the local interest of having local issues settled “at home”; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws, or the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. To keep the analysis flexible, the court noted that it did not provide a complete catalogue of circumstances leading to the grant or denial of the motion, just a general framework for analysis.

Before considering the balancing of private and public factors, however, a *Gulf Oil*-type of analysis requires that the court inquire as to the availability of an alternative forum. It thus appears that the American version of the doctrine adopted the qualification, expressed in *Clements v. Macauley* and *Société du Gaz*, that the defendant must prove an alternative appropriate forum exists before a

91. See supra text accompanying note 48.
92. Gulf Oil, 330 U.S. at 508.
93. See Blair, supra note 7, at 1 (arguing that it is appropriate forum non conveniens doctrine should work to help relieve a congested court calendar when a more appropriate forum exists).
94. See Gulf Oil, 330 U.S. at 508 (listing the public factors to be balanced against the private interests of the parties).
95. See id. (“Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy.”).
96. In 1929, Blair argued that, because there seemed to be a split between the Scottish and English case law on whether it should be determinative to the analysis whether or not the plaintiff has an alternative forum, the American version of the doctrine should be adjusted so the plaintiff has the burden “of coming forward with replicatory matter to overcome the force of the plea by establishing some justification for an assumption of jurisdiction[.]” Blair supra note 7, at 33–4; see also Ann Alexander, Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 Colum. L. Rev. 1000, 1004 n.22 (1986) (noting that this suggestion was at first accepted, but was later abandoned by the federal courts in favor of placing the burden on the defendant). For all practical purposes, however, it appears that once the defendant simply identifies the possibility of an alternative forum, that is enough to shift the burden to the plaintiff to prove the inappropriateness of such. Id.
97. But see Blair, supra note 7, at 33 (arguing that an earlier leading English case seemed to dismiss this qualification).
dismissal is granted. And for justice to be met, a court would refrain from dismissing a claim on forum non conveniens grounds when a plaintiff had nowhere else to go, no matter how much proceeding with the trial vexed the defendant or burdened the court.

If the plaintiff has an alternative forum, the Gulf Oil framework suggests that the defendant’s private interests become the focus of the analysis. Here the key seems to be whether after considering the access to sources of proof, witnesses, the possibility of viewing the premises, etc., the court infers that the plaintiff’s choice of forum was based on how much harassment or vexation would be caused on the defendant. If the court infers vexation or harassment, the fact that the claim could unduly burden the judicial system is just icing on the analytical cake.

What if, however, after considering the access to sources of proof, witnesses, possibility of viewing the premises, etc., the court finds that the plaintiff’s choice of forum was, after all, reasonable as to justify a conclusion that it was not meant to harass or vex the defendant? Such situations occur when both sides can make a reasonable argument that any decision by the court would be so inconvenient to them as to be deemed unfair. This is where the public factors play a key role. If the private factor analysis does not point to harassment on the part of the plaintiff, and both sides can make reasonable arguments why or why not the lawsuit should proceed in that court, then the court can look to the burden on the judicial system.

98. See Gulf Oil, 330 U.S. at 506–07 (“In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process”); see also Comment, supra 6, at 1248 n.101 (“The statement of the Court in the Gulf Oil case... can perhaps be construed as a requirement that the defendant be amenable to suit elsewhere, as well as to process.”); Alexander, supra note 96, at 1004–05 (noting that despite the ambiguity of the alternative forum language in Gulf Oil, the alternative forum requirement is the federal law).

99. A key discussion will be what an appropriate forum means. See Gulf Oil, 330 U.S. at 507 (explaining that an alternative forum is one where “the defendant is amenable to process”); see also discussion infra Part IV.A.1 regarding the alternative forum analysis in California courts. But see Alexander, supra note 96, at 1005–06 (explaining that although the alternative forum requirement has been generally treated as an absolute, a few narrow exceptions have been developed by the court). “A good number of courts have held, for example, that a plaintiff forfeits her right to assurance of a second forum if she serves process by means of fraud or force. Also, some courts have indicated that the alternative forum requirement might be ignored if the plaintiff is herself responsible for the absence of a suitable second forum.” Id.

100. See Piper, 454 U.S. 235, 249 (1981) (following an analysis that, once an alternative forum has been identified, “dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court”); see also Gulf Oil, 330 U.S. at 507–08 (establishing that the private interests of the litigant are the most pressed to be considered by the court, presuming that there are at least two forums in which the claim can be heard).

101. See Piper, 454 U.S. at 249 n.15 (suggesting that “Gilbert held that dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant”).

102. See id. at 259 (acknowledging that while a finding that the plaintiff’s forum selection is too burdensome to defendant is enough to permit dismissal on forum non conveniens grounds, the court continued its analysis by reviewing the public interests that might be affected by the litigation).
to determine whether to dismiss the action or not. Judicial economy becomes the tie-breaker.\(^{103}\)

In *Piper*, the Supreme Court added hues to each portion of the framework outlined in *Gulf Oil*. In the initial stages of the analysis, where the availability of an alternative forum is the important inquiry, the *Piper* court said that the fact that the foreign forum's substantive law is less favorable cannot be given neither conclusive nor substantial weight when deciding whether an alternate forum existed.\(^{104}\) When it came to whether the plaintiff's choice of forum must reach the level of vexation and harassment necessary to justify dismissal, the court lessened the threshold necessary for the defendant to prove that the private factors balance in her favor. As noted earlier, the private factors help determine whether or not the forum is valuable to the plaintiff *precisely* because it inconveniences the defendant. The defendant can prove the unfairness of this inconvenience by pointing to the private factors. Underlying this analysis is the court's presumption that unless the private factors balanced "strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."\(^{105}\) Where the plaintiff is foreign to the state, however, the *Piper* court stated that this presumption deserved "less deference."\(^{106}\)

Without the presumption, the natural, built-in resistance of courts\(^{107}\) to dismiss a case over which it already has jurisdiction lessens, allowing for an easier accommodation of the defendant's private interests.

Finally, *Piper* illustrated how the public factors come into play when "the private interests point in both directions."\(^{108}\) As noted earlier, the tie-breaker in these circumstances will be in how the court balances the public factors.\(^{109}\) In *Piper*, the court, after finding that the private factors balanced each other pretty evenly,

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103. See Stein, *supra* note 65, at 824 (noting that the court in *Piper* had to rely on the public interests to break up a tie between the interests of plaintiff and defendant "[a]fter finding the conveniences in relatively equal balance."); see also Stangvik v. Shiley, Inc., 819 P.2d 14, 26 (1991) (pointing to a similar situation, and outcome where the court finds itself with each side providing reasonable arguments that private factors favor their position). At that point, the California high court reached out to the public factors and concluded that these favored the defendant. *Id.* For further discussion on California's application of the doctrine, see *infra* Part III.

104. See *Piper*, 454 U.S. at 247. *But cf.* Stangvik, 819 P.2d at 19, 26 (disapproving lower court's holding that the unfavorable change in law is of fundamental importance to a forum non conveniens analysis). "In our view, the fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that some remedy is afforded." *Id.*


107. See *Gulf Oil*, 330 U.S. at 508 (explaining that behind the U.S. Supreme Court's willingness to adopt the forum non conveniens doctrine was its belief that doctrine would not be abused since "experience has not shown a judicial tendency to renounce one's own jurisdiction."); see also Stein, *supra* note 65, at 796 (recognizing that the forum non conveniens doctrine was a "dramatic exception to the cardinal rule at common law of 'judex tenetur impertiri judicium suum': a judge must exercise jurisdiction in every case in which he is seized of it") (emphasis added).


109. See *supra* text accompanying note 103.

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focused on the fact that because the accident occurred abroad and all potential plaintiffs and defendants were foreigners, the alternative forum had a stronger interest in the litigation. Rejecting the argument that America also had a strong interest in the litigation since the product associated with the accident (an airplane) was designed and manufactured here, the court noted that the incremental deterrence that may be gained by suing in the United States versus the alternative forum "is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were tried here."  

D. Multi-Factor Balancing Tests—Warning! Handle With Care

In addition to the general framework for analysis described above, both the Gulf Oil and Piper decisions forwarded factors the high court considered important for balancing under this framework. The high court also expressed a belief that in order for the doctrine to be of maximum utility, the balancing of multiple factors categorized under the rubric of private and public interests should be as flexible and accommodating as possible. Ironically, it is precisely this flexibility in the balancing of factors that has been questioned by judges and scholars alike. Some claim that the Gulf Oil’s Gilbert Factors lead to a decision-making process that is "vague and open-ended," arbitrary, open to manipulation, and perhaps even racist. One scholar has summarized the criticism as follows:

Alexander Bickel studied the early admiralty experience with the doctrine and found the picture “not... a happy one.” He concluded that the reported decision “defy analysis and rational classification” and that the lack of any clear doctrinal guidelines left the courts in a “judicial impressionism” that is the opposite of the “judicial process as we know it”. And Justice Scalia recently wrote: [t]he discretionary nature of the doctrine, combined

110. See Piper, 454 U.S. at 260 (noting that, even if the choice-of-law analysis of the trial court was incorrect and American law would apply in the case, “all other public interest factors favored trial in Scotland”).
111. Id. at 261.
112. For a complete discussion of the Gilbert Factors, see supra Part II.C.
113. See Piper, 454 U.S. at 250–51 (stating that the court “would not lay down a rigid rule to govern discretion, and that ‘[e]ach case turns on its fact’”) (quoting Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946)); see also Gulf Oil, 330 U.S. 501, 508 (1947) (“Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial. The doctrine leaves much to the discretion of the court to which plaintiff resorts”).
114. See Robertson, supra note 74, at 358 (“From its inception in this country right down to the present moment, the doctrine of forum non conveniens has provoked a steady chorus of judicial and scholarly criticism”).
115. See Waller, supra note 5, at 112 (arguing that various doctrines of jurisdictional analysis courts engage dealing with transnational litigation lead to redundant analysis and should be replaced with an omnibus inquiry dealing with why a United States court should resolve a particular issue).
116. Myers v. Boeing Co., 794 P.2d 1272, 1281 (1990) (stating that a forum non conveniens factor which “in application, gives less deference to foreign plaintiffs based on their status as foreigners, raises concerns about xenophobia. This alone should put us on guard.”).
with the multifariousness of the factors relevant to its application, make
uniformity and predictability of outcome almost impossible.\(^{117}\)

Criticism of factor-balancing analysis, however, is not segregated to the forum
non conveniens doctrine. The problems of uniformity and predictability of outcome
appear to be one of the fundamental risks generally associated with any type of
multi-factored analyses.\(^{118}\) Under the multi-factor tests approach, "a court either
quotes or constructs a list of facts, which in prior cases, accompanied decisions. . . . The
court then compares the list with the facts in the situation at hand"\(^{119}\) to reach
a decision. While factor-balancing has its merits, the approach becomes problematic
in those instances when courts incorporate the facts from prior opinions into their
opinions, without first evaluating how each fact may or may not be relevant to the
court's analysis.\(^{120}\) Another problem is that, unless the courts provide an analytical
hierarchy, it is difficult to ascertain what factors, or combinations thereof, are
critical to an analysis. One commentator frames the issue by rhetorically inquiring
"[m]ust all factors be present? Is the presence of one factor enough? . . . [H]ow
many factors does one need and which factors are more important than others?"
\(^{121}\)

Multi-factored tests are problematic in other ways. Because of their ambiguity
and open-endedness, critics complain that the application of the test "will confuse
those who look to the case for precedent."\(^{122}\) In some instances, opinions sharing

\(^{117}\) See Robertson, supra note 74, at 358–59.

seem to shy away from declaring definite rules. They prefer to avoid definite decision by announcing a vague
standard, or what amounts to the same thing, a multifactored test with equal weighting of each factor, leaving to
the indefinite future the resolution of the uncertainties implicit to such approach."); see also Franklin A. Gevurtz,
Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate
Veil, 76 Or. L. Rev. 853, 856 (1997) (suggesting that multi-factor tests, while comforting to students, litigants
and courts because it gives them something to base their analysis on, many times result in analysis that is
irrelevant or of questionable significance to the policy behind the rule).

\(^{119}\) See Gevurtz, supra note 118, at 856; see also Posner, supra note 118, at 247 (commenting on a court of
appeals opinion that lists factors from earlier opinions, but then fails to provide any direction of how the factors
should be weighed); Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307, 1366–67
(1995) ("Multifactor tests or formulaic standards as a means to capture pre-existing doctrines and relevant policy
considerations in a simple checklist form.").

\(^{120}\) See Gevurtz, supra note 118, at 857 ("[L]isting facts from prior opinions without an evaluation of why
these facts should or should not lead to piercing inevitably introduces facts into these sorts of lists, which, upon
reflection, seem of questionable significance.").

\(^{121}\) Gevurtz, supra note 118, at 857–8; see also Hemmelgarn v. Boeing Co., 165 Cal. Rptr. 190, 195 (1980)
(discussing how forum non conveniens analysis requires something more than "merely counting the factors in
favor of granting or denying the motion").

\(^{122}\) Gevurtz, supra note 118, at 858; see also Posner, supra note 118, at 245 (suggesting why multi-
factored tests may be of little value to those looking to court opinions for guidance:
I recently came across an opinion . . . in which the [appeals] court first reminded the district court of
an earlier decision that had prescribed twelve factors for the district courts to consider . . . and then for
good measure added five more factors for the district court to consider. Since no weighting of the
factors was suggested, the test is wholly nondirective . . .

(Citation omitted).
similar factual situations result in diametrically-opposed results. Precedents that leave confusion and conflicting signals are of little value to lawyers representing clients. In his dissent to the majority opinion in *Gulf Oil*, Justice Black stated:

> The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.

Finally, some commentators note that forum non conveniens analysis is not convenient or efficient about factor analysis. They complain that multi-factored jurisdictional tests, such as those used in forum non conveniens, tie up courts in "complicated, unstructured, time consuming, and expensive balancing process prior to the resolution of the merits of the dispute." In Justice Black's dissent to *Gulf Oil*, he criticized the Court's adoption of the forum non conveniens doctrine on the additional ground that its application of factor-balancing would, ironically, inconvenience the court: "[T]he Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums." Increased litigation may also result when one side tries to argue exhaustingly and expensively through the appeals process that its party is or is not inconvenienced by the claim.

Notwithstanding the criticism, factor-balancing is an important component of forum non conveniens analysis. Both federal and state courts, including California's state courts, engage in an exercise of "balancing" competing factors to determine whether or not an appropriate forum is inconvenient. Therefore, any

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123. See Robertson, *supra* note 74, at 360 ("[R]ecently reported decisions include diametrically opposed outcomes in seemingly virtually identical cases.").


125. See Robertson, *supra* note 74, at 380 (countering the efficiency argument by noting that "[f]orum non conveniens in its present form is simply too unprincipled to be justified by whatever effectiveness it might have as a way of rationing scarce judicial resources."). But see *Weintraub*, *supra* note 8, at 352 ("Forum non conveniens furthers the efficient and fair use of our judicial resource.").

126. See *Waller*, *supra* note 5, at 131.


128. *See generally* *Weintraub*, *supra* note 8, at 352 (arguing that "[s]ubjecting United States defendants to suit here by a foreigners injured abroad places our companies at a world-wide competitive disadvantage."). But *cf.* Robertson, *supra* note 74, at 354 (arguing that factors should not penalize "personal injury victims whose rights to a hearing on the merits of their claims were threatened by the forum non conveniens doctrine").

129. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996) (asserting that a dismissal for forum non conveniens reflects the balancing of interests articulated in *Gulf Oil* and *Piper*).

130. *See, e.g.*, *Piper*, 454 U.S. 235, 241 n.6 (1981) (listing the *Gulf Oil v. Gilbert* factors composed of private and public interests which are to help guide the trial courts' discretion); Stangvik v. Shiley, Inc., 819 P.2d 14, 18 (1991) (recognizing that forum non conveniens analysis engages the use of factors that reflect long standing principles reiterated by the high court in *Gulf Oil*); *Ryan & Berger*, *supra* note 80, at 535 ("[T]he application of
analysis regarding the appropriateness and fairness of a California court to dismiss a case on forum non conveniens grounds requires a review of the development and application of multi-factor analysis in the state’s courts.  

III. FORUM NON CONVENIENS—CALIFORNIA STYLE

California’s forum non conveniens doctrine made its presence known on the state’s judicial horizon over half a century ago. The doctrine was codified into law in 1970, and has led an active and interesting life ever since.

A. General Introduction

In California, just as in federal courts, the doctrine provides the court with the discretion to dismiss the case for a trial in an alternative, more convenient, forum. Similarly, California courts have recognized that while the power to dismiss a case for trial in another alternative forum is discretionary, it must be exercised “with caution and restraint.” The analytical approach to dealing with forum non conveniens factor analysis manifested in Gulf Oil and Piper was adopted by the

the doctrine is a matter of judicial discretion . . . . It is the consideration of the factors involved in the doctrine . . . that furnishes the criteria by which the trial court may exercise its discretion. The California Supreme Court . . . has set forth some criteria which the trial courts are to consider in determining whether the doctrine should or should not apply:”).

131. See supra note 130 and accompanying text.


133. See CAL. CIV. PROC. CODE § 410.30(a) (West 1973) (“When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.”).

134. See Vulliet, supra note 132, at 1256 (noting that at the time the doctrine became part of the California Code of Civil Procedure, “some increase[s] in the use of the doctrine of inconvenient forum seem[ed to be] presaged by the manner of its codification”). In an informal database search in LEXIS and WESTLAW, this author located about a dozen pre-1970 instances in which California courts dealt with a forum non conveniens issue. A similar search focusing on post-1970 dates and after the doctrine was codified resulted in the location of over 100 cases where the issue of inconvenient forum was raised. This suggests that the commentator’s intuition was correct that the codification of the doctrine would likely lead to increased litigation. Consideration should also be given to the fact that the increase number of forum non conveniens cases may be due, in part, to the general increase in litigation.

135. See generally King, supra note 5, at 1115 (providing a review of the doctrine’s application from the time it was codified up to Stangvik).

136. See Piper, 454 U.S. 235, 249 n.13 (1981) (noting that the court did not have to resolve the issue whether California’s state court application of the doctrine differs from that used in federal courts since lower courts had already concluded that “California law on forum non conveniens dismissals is virtually identical to federal law”).

California Supreme Court in 1954 in *Price v. Atchison, Topeka & Santa Fe Ry. Co.* This framework was later reaffirmed in the *Stangvik v. Shiley, Inc.* opinion, the most important forum non conveniens decision from the state’s high court since *Price.*

*Stangvik* was a high-profile litigation, with the potential for additional claims in the thousands likely to be litigated in California, depending on the outcome of the case. The wives and children of two men (who died after receiving heart valve implants designed and manufactured by California-based Shiley Incorporated (Shiley) and its parent company) filed suit alleging that the valves failed due to a manufacturing defect which led to the men’s death. The families were foreigners, one from Norway and the other from Sweden. Shiley moved for a dismissal or stay on the grounds of forum non conveniens, asserting that Sweden and Norway were more natural forums for the trial because “it was in those countries that the plaintiffs resided, the valves were sold, decedents received medical care, the alleged fraudulent representations were made, and evidence regarding the provision of health care and other existed.”

The trial court granted the stay subject to a number of conditions including: the defendant agreeing to jurisdiction in Norway and Sweden, compliance with discovery orders of the local courts, agreement to make past and present employees available to travel abroad at defendant’s cost, tolling of the statute of limitations, and other conditions aimed toward the guarantee that the trial could proceed in an alternative forum. The court of appeals affirmed and declined to follow precedent from two earlier California court of appeals’ decisions which, if adopted, could have kept the Shiley suit alive in California.

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138. *See supra* note 12 and accompanying text; *see also* discussion *infra* Part III.C (analyzing *Price*).


140. *See Stangvik v. Shiley, Inc.*, 819 P.2d 14, 26 (1991) (“If we hold that the present cases may be tried in California, it will likely mean that the remaining 108 cases involving the Shiley valve will also be tried here. The burden on the California courts of trying these numerous complex actions is considerable.”); *see also* Moskowitz, *supra* note 6, at F13 (“Judges worried about court congestion can tell foreigners to go home . . . so that California does not have to take on the burden of trying the cases, which involve hundreds of witnesses and about a million pages of documents.”).

141. *See Stangvik v. Shiley, Inc.*, 819 P.2d at 16 (recounting how the families filed a suit against Shiley seeking damages based on theories of negligence, strict liability, breach of warranty, fraud, and loss of consortium).

142. *See id.*

143. *See supra* text accompanying note 133.


145. *See id.* at 17 n.2 (providing the list of seven conditions the defendant agreed to, as required by the trial court before staying the action).

The California Supreme Court affirmed and in so doing, rejected attempts by the lower courts to reconfigure the factor balancing framework set out in *Gulf Oil* and adopted in California in *Price*. Critics of *Stangvik* have ascribed different motives to the high court's approach, including a desire to protect multi-national interests of corporations that are residents of the state, while saving taxpayer dollars. Others argue that with *Stangvik*, the California court abdicated an opportunity to expand the traditional use of forum non conveniens as a procedural tool, turning it instead into an instrument of social change. Before addressing whether either of these arguments is based on a well-intended, but inappropriate, understanding of the doctrine, we shall explore the doctrine's evolution in California.

**B. In The Beginning—Forum Non Conveniens' Early Years**

Since the U.S. Supreme Court has said that states are not bound by the federal forum non conveniens doctrine, states are free to make their own determinations whether their courts will exercise jurisdiction. One reason may be that early application of the doctrine in the United States seemed to coincide with the adoption of statutes by state legislatures expanding the jurisdiction of states to include cases dealing with nonresidents. Therefore, the doctrine had its own independent life in state courts.

During the first four decades of the 20th century, the doctrine was seldom referred to, or applied by, California courts. As an illustration, consider the 1942
California court of appeals case, *Idonah Slade Perkins v. Benquet Consol. Mining Co.* The court, in rejecting the defendant's request that the case be dismissed on grounds of forum non conveniens, did not cite a single California case. California's progression in adopting the doctrine coincided with the general increase in litigation states were experiencing due, in part, to newly-imposed jurisdiction requirements emanating from the state legislatures and from Congress.

C. *Price v. Atchison, Topeka & Santa Fe Ry. Co.—California Uses Doctrine to Dismiss A Claim*

In its 1954 *Price v. Atchison, Topeka & Santa Fe Ry. Co.* decision, the California Supreme Court for the first time used the forum non conveniens doctrine to dismiss an action the state court otherwise had jurisdiction over. The case dealt with a cause of action under FELA. The plaintiff, a citizen and resident of the State of New Mexico, was injured on two different occasions while working for the defendant railroad company. Plaintiff filed the action in the superior court in Los Angeles under the provisions of the FELA. The defendant was a Kansas corporation, doing business in New Mexico and California. Although both accidents occurred in New Mexico, California could assert jurisdiction over the defendant based on the defendant's business contacts with the state.

The first issue the *Price* court dealt with was whether or not the state court had any discretion to decline jurisdiction over a FELA claim. It quickly concluded...
that since the U.S. Supreme Court decision in *Southern Railroad Company v. Mayfield*, states could deny access to their courts to persons seeking recovery under FELA so long as "if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially... so as not to involve a discrimination against Employers' Liability Act suits and not offend against the Privileges-and-Immunities Clause of the Constitution."\(^{163}\)

With the door now open, the *Price* court began its analysis regarding the appropriateness of a forum non conveniens dismissal.\(^{164}\) The court zeroed in on what appeared to be the key policy concern: how burdensome will it be to California courts to allow litigation of cases involving an out-of-state plaintiff on a claim arising from events that occurred outside the state.\(^{165}\)

> [W]e are of the view that the injustices and burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors... require that our courts... exercise their discretionary power to decline to proceed in those causes of actions which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere.\(^{166}\)

What is satisfactory evidence? Here *Price* relied on *Gulf Oil* and the factors delineated in that opinion for guidance,\(^{167}\) and incorporated *Gulf Oil*’s rationale that the doctrine was a fitting way to deal with a very old problem "affecting the administration of the courts," i.e., the misuse of venue.\(^{168}\) Specifically, the *Price* court said courts could and should consider the "[a]dministrative difficulties [that] follow [the] courts when litigation is piled up in congested centers instead of being handled at its origin."\(^{169}\)

Some important facts led the court to grant dismissal. The court was clearly bothered by the fact that the attorneys representing the plaintiff had also filed “in...
superior court in Los Angeles some sixty-seven actions against defendant based
upon causes of action arising in other states under the FELA." The court
disapproved of the plaintiff attorneys' continuous selection of California as a forum
no matter where the claim arose or whether the parties were California residents. To the court, the attorneys' actions could have been a strong indication that some
"vexing" or "harassment" of the defendant was the goal, perhaps to force a
settlement of the claim. The court continued its analysis by looking at how
litigation would strategically and financially affect the defendant. In the end, it
concluded that the balancing favored the defendant.

The court did not find persuasive the plaintiff's argument that he selected the
forum because, under FELA, he had the absolute right to do so. While
recognizing that an inquiry regarding the availability of an alternative forum was
an appropriate inquiry for the court, the court found unpersuasive, the suggestion
that the dismissal request be denied because the statute of limitations, which would
bar one of the reasons of action in the alternative forum, left him forumless. The
court harshly noted that "if plaintiff chooses without justification to bring his action
under circumstances warranting application of the doctrine it is a deliberate risk
assumed by him and he must be prepared to meet any losses sustained as a
result." This statement seems to signal that the alternative forum requirement
seen in the federal version of the doctrine was not a shield against dismissal.

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170. Id. at 458. The court's focus is consistent with contemporary concerns of the organized bar that FELA
was affording unethical lawyers with the opportunity "to solicit such causes of action arising in outlying areas for
suit in larger cities by promises of more liberal settlements or larger verdicts." Barrett, Jr., supra note 33, at 383.
171. See Price, 268 P.2d at 458 (pointing out that for the last five years, plaintiff attorneys had "also filed
twenty-one of such imported cases in the federal district courts in this State").
172. See Barrett Jr., supra note 33, at 382 (suggesting that plaintiff with doubtful or speculative causes of
action usually select an inconvenient forum for the defendant so as to coerce a larger settlement than the merits
of the case would warrant).
173. See Price, 268 P.2d at 458 (estimating that it would cost the defendant an additional $4650 to litigate
the case in Los Angeles versus New Mexico. The expenses included bringing witnesses in from other states and
paying for travel, lodging and meals, plus the added cost of having to pay the doctors who treated the plaintiff in
New Mexico for their time, assuming that they would be willing to leave their practices to attend the trial).
174. See id. at 462 (holding that the trial court had properly acted within its discretion in granting the motion
to dismiss).
175. Id. ("Moreover, the only ground urged by plaintiff for trial in this State is his claim of an absolute right
thereto, a right which, as we have seen, has been negated by the . . . United States Supreme Court").
176. See id. at 462 ("The suggestion . . . that the doctrine should not apply because if an action filed by the
nonresident plaintiff is dismissed by the California courts his rights may be barred by limitations statutes is
without merit.").
177. Id.
178. See id. But see Stangvik v. Shiley, Inc., 819 P.2d 14, 18 (1991) (clarifying that since the doctrine was
codified, application of the doctrine will depend on the availability of an alternative forum). Stangvik relies on
language provided by the Judicial Council's comment to section 410.30:
[The action will not be dismissed unless a suitable alternative forum is available to the plaintiff
[citations]. Because of . . . [this] factor, the suit will be entertained, no matter how inappropriate the
forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same will be true
if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the
court recognized, however, that the plaintiff relied on previous opinions indicating that a state court could not dismiss a FELA claim.\textsuperscript{179} Also, the defendant agreed to allow the trial to proceed on this one action in Los Angeles, did not go beyond the reprimand. Therefore, the court declined to rule that the alternative forum prerequisite would be waived if a plaintiff with a FELA claim filed in California, and in doing so missed the window of opportunity to file the same claim in the alternative forum.\textsuperscript{180}

Another factor important to the court was the administrative inconveniences and public costs associated with FELA claims brought by nonresidents based on events that occurred outside the state:

The difficulties and inconvenience to defendant, to the court, and to the jurors hearing the case, of attempting to proceed where witnesses are not amenable to process, and where testimony may have to be presented by deposition, are apparent . . . . \textit{And as already mentioned}, the expense and burden resulting to local taxpayers, courts, and jurors, of providing a forum for the trial of imported cases also weigh against plaintiff.\textsuperscript{181}

With \textit{Price}, California officially welcomed the forum non conveniens doctrine as a new discretionary procedural tool. In addition to citing to the \textit{Gulf Oil} factors,\textsuperscript{182} the \textit{Price} court adopted a similar analytical framework as that found in \textit{Gulf Oil}. In \textit{Price}, the forum non conveniens inquiry recognized as a legitimate concern whether the plaintiff had an alternative forum. It asked whether the forum selection was the result of plaintiff's desire to harass or vex the defendant. If such was not the case, and assuming that an alternative forum existed for the plaintiff, the analysis concluded with a consideration regarding how the public interests outweighed the private ones.

Just as \textit{Gulf Oil} faced criticism for its tiered, multi-factored analysis,\textsuperscript{183} \textit{Price} similarly encountered skeptics. Justice Jesse W. Carter, in his dissent to \textit{Price}, rejected the court's adoption of the doctrine, and criticized its actions on three key grounds. First, the justice believed that the legislature, and not the court, was the court is willing to accept the defendant's stipulation that he will not raise this defense in the second state . . . .

\textsuperscript{179} See \textit{Price}, 268 P.2d 457, 463 (1954) (recognizing that since plaintiff had relied on what had been the declared law of the state "that our courts were compelled to reject the doctrine of forum non conveniens with respect to FELA cases, and in order that as to the first cause of action plaintiff may not through reliance upon the Leet decision be barred by the statute of limitations").

\textsuperscript{180} See \textit{id.} at 462–63 (strongly suggesting, but stopping short of holding, that in such cases the alternative forum requirement will be waived).

\textsuperscript{181} Id. at 462 (emphasis added).

\textsuperscript{182} See \textit{id.} at 462 (quoting the passage in \textit{Gulf Oil} that articulate the Gilbert Factors, and how the Supreme Court applied them).

\textsuperscript{183} See discussion \textit{supra} Part II.D.
appropriate body to decide whether, and under what circumstances, a state court should be allowed to dismiss a case under the doctrine. Justice Carter hoped that if such a statute were enacted "it could, and undoubtedly would, embrace rules of procedure to guide the courts in the application of such doctrine." (emphasis added)

Second, and closely related to the first concern, Justice Carter believed that the framework was a call for vagueness, arbitrariness, instability, and confusion for those who depended on clear procedural directions from the bench:

"In effect, the holding of the majority here means, that it will never be safe for any citizen of the United States to prosecute in the courts of this state, a cause of action which arose in another state or territory. The plaintiff runs the risk, first of a judgment of dismissal by a trial court, and even if he prevails there, he is faced with the prospect of a reversal by this court with direction to the trial court to dismiss the action. Every lawyer who has had experience in the trial of cases knows that the ultimate outcome of any case of this character depends upon the leaning of the members of the court which has the last say and there can never be a rule to guide the course which he should pursue."

The third concern expressed by Justice Carter focused on how the court-made doctrine might lead to judicial inefficiency. In his argument Justice Carter narrowed in on "the difficulty of stating properly the circumstances under which the doctrine should or should not result in dismissal."

The confusion and injustice which have resulted from the vague doctrine is ably pointed out in discussing its application to transfers of actions in the federal courts under the federal law: "A close review of cases involving Section 1404(a) reveals the extent of doubt,

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184. See Price, 268 P.2d 457, 471 (1954) ("It seems to me that if the doctrine... is to be adopted in this state, it should be by legislation where ample safeguards could be provided to protect those plaintiffs who in good faith, and after proper advice, seek redress in our courts on out-of-state causes of action.").

185. Id. (emphasis added). As shall be explored later, Justice Carter's hope that the legislature would produce a rule of procedure specific enough to guide the court's analysis was not to be. See discussion infra Part III.E.; see also Ryan & Burger, supra note 80, at 553 (suggesting that the California Legislature could have performed "a more valuable service by enacting a forum non conveniens statute capable of reasonable and uniform application throughout the state court system.").


187. Id. at 468. (citation omitted).

188. 28 U.S.C. § 1404 (1988) (allowing courts to consider transferring any civil action to another appropriate district court or division "[f]or the convenience of parties and witnesses, in the interest of justice").
Continuing with his analogy, Justice Carter cited a federal district judge who expressed palpable frustration as he was deciding a motion to transfer. “To attempt to resolve the niceties involved in balancing the relative conveniences of all of the parties to any degree of certainty, resort must be had to an apothecary’s scale and crystal ball; neither of which implements are available to this court.”

Notwithstanding Justice Carter’s criticism, the doctrine officially became part of the California court system’s procedural arsenal. Price adopted the Gulf Oil list of factors without modification. In applying the factors, it seemed to follow the framework set up in Gulf Oil and Piper. However, the next twenty-four years brought about an explosion of factors that the court could consider, culminating in 1970, when the court in Great Northern Ry. Co. v. Superior Court of Alameda County applied a laundry list of twenty-five factors to its analysis.

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190. Id. at 469.
191. See id. at 461–62 (quoting directly from Gulf Oil when listing the public and private factors to be considered by the court, then matching the facts in Price to the appropriate Gulf Oil factors).
192. See Great Northern, 90 Cal. Rptr. 461, 466–67 (1970) (holding that the trial court abuse its discretion by not granting a motion to dismiss on forum non conveniens grounds in a wrongful death claim where plaintiff was a resident administrator of the estate of a non-resident decedent and the accident giving rise to the claim occurred out of state, even though defendant did business in California and jurisdiction was proper under FELA). Factors listed include:

1. The amenability of the defendant to personal jurisdiction in the alternative forum;
2. The relative convenience to the parties and witnesses of trial in the alternative forum;
3. The differences in conflict of law rules applicable in this state and in alternative forum;
4. The principal place of business of the defendant;
5. Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state;
6. Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried;
7. Whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state;
8. Whether witnesses would be inconvenienced if the action were prosecuted (a) in this state or (b) in the forum in which the moving party asserts it ought to be prosecuted;
9. The relative expense to the parties of maintaining the action (a) in this state and (b) in the state in which the moving party asserts the action ought to be prosecuted;
10. Whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case;
11. Whether prosecution of the action will or may place a burden on the courts of this state which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state;
12. Whether the parties participating in the action have a relationship to this state which imposes upon them an obligation to participate in judicial proceedings in the courts of this state;
13. The interest, if any, of this state in providing a forum for some or all of the parties to the action;
14. The interest, if any, of this state in regulating the situation or conduct involved;
15. The avoidance of multiplicity of actions and inconsistent adjudications;
16. The relative ease of access to sources of proof;
17. The availability of compulsory process for attendance of witnesses;
18. The relative advantages and obstacles to a fair trial;
19. The public interest in the case;
20. Whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by plaintiff;
21. Whether imposition of jury duty is imposed upon a community having no relation to the litigation;
D. *Great Northern's Twenty-Five Factor List*

In *Great Northern*, the court of appeals dealt with another FELA-related claim. The wife of a Great Northern Railway Company employee who died while performing his duties filed a wrongful death action against the railroad. Even though the accident that killed her husband occurred in the state of Washington, and even though the plaintiff was not a California resident, the suit was filed in California. Great Northern failed to convince the trial court to dismiss the case on the grounds of forum non conveniens. The court of appeals held that the trial court had abused its discretion when it failed to apply the doctrine to dismiss the case. "Upon the uncontroverted facts, the ends of justice and fairness require that the action be tried in Washington where the accident occurred and where the real party in interest and the witnesses reside." How did the *Great Northern* court reach the conclusion that justice and fairness required that the case be tried in Washington? The court applied a list of factors, a total of twenty-five, that it gathered from several authorities. The court literally went factor-by-factor and answered either "affirmatively" if the factor applied to either the plaintiff, defendant, or the court, or "neutrally" if the factor did not seem to have much impact on the parties. For example, the court looked at the first factor in its analysis, whether the defendant would be amendable to personal

and burden on, local courts and taxpayers; (23) The difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by depositions; (24) Availability of the forum claimed to be more appropriate; and (25) The other practical considerations that make trial of a case convenient, expeditious and inexpensive.

193. See id. at 464 (confirming that a claim for wrongful death was filed in Alameda County, California, against Great Northern under the Federal Employer's Liability Act).

194. See id. and accompanying text.

195. See id. (explaining that the accident that killed the plaintiff's husband occurred on Great Northern's main line between Wenatchee and Spokane; that the widow continued to reside in Spokane, but that the case was filed in California since Great Northern maintains "off-line" offices in the state and the administratrix of the deceased estate is a resident of Alameda County). "It is conceded that under the Federal Employer's Liability Act an action may be filed in any state where a defendant railroad...may be doing business at the time of the commencement of the action." Id.

196. See id. at 463 (noting that the superior court had previously denied a motion to dismiss based on forum non conveniens grounds).

197. See id. at 467-68 (concluding that "weighing the several factors which should have guided the trial court's discretion it becomes apparent that the failure to apply the doctrine of forum non conveniens was an abuse of discretion").

198. Id. at 468.

199. See id. at 465 (explaining that "[s]everal authorities have announced legitimate factors to be considered by the court"). Authorities include *Gulf Oil*, California case law, including *Price*, the 1969 Report of Judicial Council of California, and a law review article. See id. at n.2. (providing citations for authorities). For a complete list of the factors in *Great Northern*, see supra note 192 and accompanying text.

200. See id. at 466-68 ("We set forth a composite of these considerations, with our conclusion whether the facts of the instant case as applied to the several factors, operated affirmatively, neutrally or negatively as support for Greater Northern's motion to dismiss.").
jurisdiction in the alternative forum.\textsuperscript{201} Without much analysis, the court quickly concluded that the factor favored affirmatively the dismissal of the claim since Great Northern could be served with process and sued in Washington.\textsuperscript{202} The court proceeded with a similar analysis for the remaining twenty-four factors on the list, and reached the conclusion that dismissal was appropriate since most of the factors seemed to support Great Northern's argument that the forum was inconvenient.\textsuperscript{203}

Great Northern guided subsequent courts' forum non convenient analyses in a number of important, albeit sometimes problematic, ways. The case summarized twenty-five factors that would become part of a multi-factor template employed by subsequent courts in their forum non conveniens balancing.\textsuperscript{204} The case also pointed to a change in the analytical framework in Gulf Oil, as adopted and applied in Price.\textsuperscript{205} In Great Northern we see a "flattening" of the framework because the court fails to begin its inquiry with the "threshold" question of whether the plaintiff has an alternative forum for his claim. Instead, the question of availability of alternative forum became just one of dozens of possible factors to balance against each other.\textsuperscript{206} This flattening led subsequent courts to engage in some creative, and according to Stangvik, unsound forum non conveniens applications.

\begin{itemize}
  \item \textsuperscript{201} See id. at 466 (listing the first factor to be considered in the court's balancing test).
  \item \textsuperscript{202} See id. (concluding that the first factor favors Great Northern's motion to dismiss).
  \item \textsuperscript{203} See Great Northern, 90 Cal. Rptr. 461, 466–67 (1970) (concluding that factors dealing with the relative ease of access to sources of proof, whether witnesses would be inconvenienced by having the trial in California, the relative expense to the parties of maintaining the action in California versus Washington, whether a view of the premise by the trier of fact may be necessary or helpful, and California's inability to compel witnesses from Washington to participate in the trial are all in support of defendant's motion to dismiss).
  \item \textsuperscript{204} See Delfosse v. C.A.C.I Inc.-Federal, 267 Cal. Rptr. 224, 226 n.3 (1990) (listing the factors enumerated in Great Northern as those considered in forum non conveniens analysis); see also Holmes, 202 Cal. Rptr. 773, 776 (1984) (noting that in forum non conveniens analysis California courts review a variety of factors, twenty-five of which are enumerated in Great Northern); Hemmelgarn v. Boeing Co., 165 Cal. Rptr. 190, 194 (1980) (pointing that primary factors that courts should consider in ruling on a forum non conveniens motion have been articulated in a number of decisions applying the doctrine, including Great Northern).
  \item \textsuperscript{205} See discussion supra Part II.C. regarding how the Gulf Oil decision set up a hierarchy forum non conveniens analysis where the threshold inquiry was whether an alternative forum existed for the plaintiff's claim, and if so, whether the private interests of the parties balanced against each other, and considerations dealing with the public interests of the forum state, favored a dismissal or disfavored a dismissal.
  \item \textsuperscript{206} See Holmes, 202 Cal. Rptr. at 780 (identifying the Great Northern factors, and selecting five the court felt more appropriate for balancing against each other, including "the availability of a suitable alternative forum"). In the conclusion of the opinion, the Holmes court again proceeded through the five factors, balancing them against each other. Id. at 786; see also Great Northern, 90 Cal. Rptr. at 467 (listing the alternative forum issue twenty-fourth in its factor list). The approach in both Great Northern and Holmes is unlike the "threshold" inquiry framework established by Gulf Oil, adopted for the most part by Price, and suggested by the statutory construction of § 410.30 of the California Civil Procedure Code. See generally Part II.B. & C.
\end{itemize}
E. The Road to Stangvik

The same year Great Northern was decided, the California state legislature codified the forum non conveniens doctrine. However, the legislature did not provide any guidance regarding how the doctrine was to be implemented. To fill this vacuum, the courts relied on the factors from Gulf Oil, Piper, Price, and Great Northern. They also began adopting the Great Northern flattened framework of incorporating the threshold inquiry of alternative forum into a private/public factor balancing. For example, it is the "flattening" of the framework which led the court in Holmes v. Syntex Lab., Inc. to undertake a "liberal" application of how the substantive law of the alternative forum impacts the dismissal determination.

In Holmes, nineteen British citizens brought a class action suit against Syntex, a Delaware corporation with its principal place of business in California. The suit alleged that Syntex was strictly liable for failure to warn of the dangerous side effects and medical complications that could result from the use of its oral contraceptive Norinyl. Syntex successfully moved for a dismissal on the grounds of forum non conveniens, arguing that the litigation should take place in Great Britain.

On appeal, the plaintiffs argued that, while the courts in Britain were available in the literal sense, "its current substantive law of product liabilities demonstrate[d] that the British courts are not a suitable alternative." The court of appeals agreed, holding that "[t]he 'suitability' of the alternative forum, encompassing such factors as differing conflict of law rules and 'substantial disadvantage' from litigation in the alternative forum, must be considered." In effect, the court's analysis pitted

207. See CAL. CIV. PROC. CODE § 410.30 (West 1973) (authorizing state courts to dismiss an action, even if jurisdiction and venue are proper, if the court "finds that in the interest of substantial justice an action should be heard outside this state").

208. See Weintraub, supra note 8, at 348 n.18 (noting that California's code "provides for dismissal without referencing to factors for consideration or conditions for dismissal . . . although comments in the annotated code by the Judicial Council contain extensive discussion of the factors to consider").

209. Every post-codification forum non conveniens decision reviewed by this author made reference to one or more of these cases as sources for the private and public factors employed in reaching a decision.

210. See Holmes, 202 Cal. Rptr. at 779 ("In short, the California standard for consideration of change in applicable law is much more liberal than that announced in Piper."). But see Stangvik v. Shiley, Inc., 819 P.2d 14, 26 (1991) (disapproving Holmes's holding that California has a different, more plaintiff-friendly standard than the federal courts and Piper regarding alternative forum considerations).

211. See Holmes, 202 Cal. Rptr. at 774–75 (noting that the British citizens consolidated their individual actions against Syntax, and agreed to allow Holmes to serve as representatives of the class).

212. See id. at 775 (alleging causes of action for negligence, strict liability, breach of warranty, fraud and misrepresentation).

213. See id. (granting the motion to dismiss citing as reasons "the location in Britain of the plaintiffs, the doctors who disseminated the drugs, the 'various agencies that had anything to do with the drugs,' . . . the 'great bulk of all of the liability evidence [and] . . . Santa Clara County Superior Court was 'an overburdened court that has just gone through a tremendous budget crisis'.")

214. Id.

215. Id.
the *Great Northern* Factor #24, availability of the forum claimed to be more appropriate, against Factor #3, the differences in conflict of law rules applicable in this state and in alternative forum,\(^{216}\) and concluded that, when the plaintiff's legal position would suffer if the case were tried in the alternative forum, a court abuses its discretion in dismissing the claim on forum non conveniens grounds.\(^{217}\) Seven years later, in *Stangvik*, the California Supreme Court rejected this approach as conflicting with the statutory requirements of the doctrine. "*Holmes* appears to consider the 'suitability' of the alternative forum not as a threshold inquiry . . . but as part of the discretionary determination to balance of convenience. We decline to follow this approach."\(^{218}\)

Similarly, in *Corrigan v. Bjork Shiley Corporation*,\(^{219}\) the court of appeals goes down the *Great Northern* check list. The case dealt with a wrongful death claim involving an Australian who had undergone heart valve surgery in Australia and received an allegedly-defective heart valve prosthesis that was manufactured by Bjork Shiley. The state trial court stayed the action. The court of appeals reversed, opining that its factor balancing found "the scale . . . tipped heavily in favor of California[.]"\(^{220}\) The court of appeals divided its decision into parts, each representing a category of factors it was going to consider. These categories included factors that the court considered "neutral," such as plaintiff's willingness to come to California to prosecute, the availability of an alternative forum,\(^{221}\) convenience of parties and trial witnesses in Australia,\(^{222}\) willingness to assume expense of trial in alternative forum,\(^{223}\) ease of access to sources of proof,\(^{224}\) ability to enforce judgement,\(^{225}\) burden on defendant, court, and jurors,\(^{226}\) and need to view physical evidence.\(^{227}\)

\(^{216}\) See supra text accompanying note 192.


\(^{220}\) Id. at 257.

\(^{221}\) See supra note 192 and accompanying text. The *Great Northern* Factor #24 is: the availability of the forum claimed to be more appropriate.

\(^{222}\) See id. The *Great Northern* Factor #2 is: the relative convenience to the parties and witnesses of trial in the alternative forum, Factor #8 is whether witnesses would be inconvenienced if the action were prosecuted (a) in the state, or (b) in the forum in which the moving party asserts it ought to be tried. Factor #17 is: the availability of compulsory process for attendance of witnesses.

\(^{223}\) See id. The *Great Northern* Factor #9 is: the relative expense to the parties of maintaining the action (a) in the state and (b) in the state in which the moving party asserts the action ought to be prosecuted.

\(^{224}\) See id. The *Great Northern* Factor #16 is: the relative ease of access to sources of proof.

\(^{225}\) See id. The *Great Northern* Factor #7 is: whether any judgment entered in the action would be enforced by process issued or other enforcement proceedings undertaken in the state.

\(^{226}\) See id. The *Great Northern* Factor #21 is: whether imposition of jury duty is imposed upon a community having no relation to the litigation. The Factor #22 is the injustice to, and burden on, local courts and taxpayers. Factor #23 is: the difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by deposition.

\(^{227}\) See id. The *Great Northern* Factor #10 is: whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case; see also supra note 189 and accompanying text.

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After setting aside the neutral factors, the court proceeded with those that were problematic, particularly the difference in conflict of law rules applicable in California and in the alternative forum. While Corrigan declined to use Holmes' balancing of the detrimental effect of the alternative forum's substantive law on the plaintiff's case against the availability of an alternative forum, the decision did give some weight to the issue as it related to the state's interest in the action. As with Holmes, the California high court in Stangvik rejected Corrigan's template approach, voicing a concern that any factor balancing dealing with the effect of the substantive law of the alternative forum on the plaintiff's case will run counter to the court's holding that this factor may not be considered in the balancing.

F. Forum Non Conveniens Recalibrated: Stangvik

Why did the high court feel compelled to re-calibrate the state's forum non conveniens analysis in Stangvik? One possible answer is the suggestion that, prior to Stangvik, some state courts engaged in a balancing test that emphasized the plaintiff's ability to secure access to "justice" with concerns about how "inconvenient" a trial in a California court would be on the defendant. Some commentators argued that this was the appropriate focus following the U.S. Supreme Court's decision in Koster v. Lumbermens Mutual Casualty Co., where the high court noted that the "ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." Under this interpretation, justice for the plaintiff did not mean ensuring that there was an alternative forum for her claim, but "ensur[ing] proper deterrence and compensation."
If this characterization is accepted, the doctrine as applied by Holmes and Corrigan evolved from a rule of procedure, regulating the number of transient claims the courts had the discretion to adjudicate, into a potential instrument of social change because the alternative forum discussion becomes part of a factor-balancing of interest, to ascertain what is "fair." For example, once the alternative forum threshold inquiry merged as part of a "private interests" inquiry, as seen in Holmes, the definition regarding what an alternative forum is changed from one whether the action can be commenced and a valid judgment can be obtained in the alternative forum, to whether the plaintiff would achieve the same level of "justice" in the alternative forum as she would get in California. Additionally, under such a framework, the possibility that a less favorable substantive law would be applied by the alternative forum became a dominating factor in the analysis. This result would follow because in cases like Stangvik that deal with product liability actions, the U.S. law almost always favored the plaintiff. The Stangvik court concluded that if this analytical approach were allowed, it would result in the weighing down of alternative forum inquiry by “requiring [the court] to interpret the law of foreign jurisdictions, which compels it to conduct ‘complex exercises in comparative law.’”

To the Stangvik court, therefore, the realignment of the doctrine’s analytical framework, evinced by the Holmes and Corrigan opinions, was not appropriate. The original policy behind the doctrine—providing justice for the plaintiff by making sure that she had a forum for her claim, justice to the defendant by making sure that the forum was not selected to harass and vex him, and justice for the public by making sure that the court system does not go bankrupt or become inaccessible—seemed to have lost its grip on the doctrine. The Stangvik decision was aimed directly at correcting this departure. It did so by reasserting the

235. But see Recent Case, supra note 6, at 1817 (suggesting that because courts do not tend to apply the traditional forum non conveniens analysis to address underlying public policy questions, they should not apply the doctrine at all to multinational product liability cases).

236. See Stangvik v. Shiley, Inc., 819 P.2d 14, 18 (1991) (clarifying that, following the Judicial Council Comments, the suitable alternative inquiry is one that deals with whether the action may be commenced in the alternative jurisdiction and a valid judgment obtained, and not with the public and private balancing of interests to determine which forum is most convenient to the parties).

237. See Holmes, 202 Cal. Rptr. 773, 785 (1984) (admitting that the suitability of an alternative forum with a products liability law that is as a practical matter inadequate is a point of “fundamental importance” in forum non conveniens analysis).

238. See Stangvik, 819 P.2d at 19 (noting that product liability plaintiffs have a number of advantages in the United States, including favorable tort law, juries willing to give generous awards, contingency fee arrangements with attorneys, and more liberal rules for discovery).

239. Id. at 19 n.5; see also Piper, 454 U.S. 235, 251 (1981) (expressing concerns that if the courts place substantial weight on the effects of substantive law on the plaintiffs in deciding a motion, “deciding motions to dismiss on the grounds of forum non conveniens would become quite difficult,” requiring that courts engage in burdensome choice-of-law analyses, and more likely than not allowing more claims to congest “already crowded courts”).

240. See supra text accompanying notes 210, 230.
supremacy of the alternative forum as a threshold question, by signaling that a number of private factors previously considered relevant were not, and by reasserting that the public factors would only trigger to break a tie when the private factors between the two parties are too close to call.\textsuperscript{241}

For the \textit{Stangvik} court, some factors had become, or were in the process of becoming, obsolete. As noted, the court rejected any factor-balancing that would consider the impact of the alternative forum's substantive law on the plaintiff's case. The court also rejected any claim that a nonresident plaintiff's choice of forum deserved the same level of deference as that of a resident plaintiff.\textsuperscript{242} Additionally, the opinion clarified that, despite a 1986 amendment to section 410.30,\textsuperscript{243} "the presumption of convenience to a defendant which follows from its residence in California remains in effect[,] . . . although the presumption is not conclusive."\textsuperscript{244}

The court in \textit{Stangvik} made reference to the fact that, in its forum non conveniens analysis, the court of appeals was willing to consider the impact on the competitiveness of the state's businesses of lawsuits brought by foreigners regarding actions that arose abroad.\textsuperscript{245} The court did not state one way or the other whether the factor was one that might merit consideration in the future; however, the fact that the court chose to acknowledge the factor has led some to believe that the impact on the competitiveness of a business may become a factor in future balancing exercises.\textsuperscript{246} Also looking toward the future, the court recognized that, due to vastly improved means of transportation and transmission, factors which deal

\textsuperscript{241} See \textit{Stangvik v. Shiley}, Inc., 819 P.2d at 18 ("In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternative forum is a 'suitable' place for trial. If it is, the next step is to consider the private interest of the litigants and the interest of the public in retaining the action for a trial in California.").

\textsuperscript{242} See id. at 26 ("The [Holmes] court first held that California, unlike federal law, affords substantial deference to a foreign plaintiff's choice of forum. We have concluded above to the contrary, and, indeed, plaintiffs in these actions do not claim that the same amount of deference is due to foreign and resident plaintiffs."). But see King, supra note 5, at 1135–36 (noting that, when the \textit{Stangvik} court adopted a position that a foreign plaintiff's forum selection deserves less deference, it "place[d] its thumb on the scale, tipping it favor of dismissal"); Major-Duval, supra note 7, at 681 (arguing that the U.S. Supreme Court should abolish the \textit{Piper} standard giving less deference to the forum selected by a foreign plaintiff because "[i]t is unfair to force a foreign plaintiff to start out the inquiry with the scales tipped toward the defendant").

\textsuperscript{243} \textit{Stangvik v. Shiley}, Inc., 819 P.2d at 21. The amendment provided that a court was not precluded from staying or dismissing the action simply due to the domicile or residence of the parties. \textit{Id.} This amendment was adopted in reaction to an earlier high court decision, \textit{Archibald v. Cinerama Hotel}, 544 P.2d 947 (1976), which held that courts were not allowed to dismiss "a suit of a true California resident on grounds of Forum non conveniens." \textit{Id.} at 952. According to the \textit{Stangvik} court, the amendment meant to focus on the status of the plaintiff, it had little bearing on a court's analysis of the defendant's position. The amendment expired on January 1, 1992.

\textsuperscript{244} \textit{Stangvik v. Shiley}, Inc., 819 P.2d at 21.

\textsuperscript{245} See id. at 24 (acknowledging that the court of appeals had considered two additional factors that weighed in favor of dismissal, including the competitive disadvantage to California businesses that would result if California manufacturers were required to defend lawsuits involving injuries that had occurred abroad).

\textsuperscript{246} See King, supra note 5, at 1140 (noting that the court did not rule against future consideration of the competitive disadvantage to California businesses in a forum non conveniens analysis).
with concerns regarding availability of witnesses and other trial inconveniences may become less important in future analyses than they were in the past.\textsuperscript{247}

In summary, \textit{Stangvik} reasserted the importance the threshold inquiry regarding the availability of an alternative forum for the plaintiff. \textsuperscript{248} At the same time, it rejected attempts to loosen the definition of what constitutes a forum suitable enough to be considered an alternative by rejecting considerations regarding how the substantive law of the alternative forum would affect the plaintiff’s claim. \textsuperscript{249} The decision suggested that factors relating to the ease of accessing proof and getting witnesses’ testimony before the court may be of less consequence in the future as innovations ease problems in transportation and communications. \textsuperscript{250} Finally, \textit{Stangvik} removed any presumption in favor of a plaintiff’s selection of forum when the plaintiff is a nonresident in the state. \textsuperscript{251}

To some, \textit{Stangvik}'s articulation of the doctrine of forum non conveniens seemed anachronistic because it resulted in the erecting of barriers keeping foreign plaintiffs out of our courtrooms precisely at a time when California’s economy is increasingly tied to international relationships, such as those emerging under NAFTA. \textsuperscript{252} The argument centers on the premise that the doctrine as applied by the \textit{Stangvik} court was the result of an antiquated application of a doctrine as first developed in a world in which international trading ties were limited and the trading pressures of today were nonexistent. \textsuperscript{253} Such an analysis, however, fails to reconcile the fact that the forum non conveniens doctrine emerged in Scotland and England precisely to deal with cases entailing commercial transactions expanding various national borders, and even continents. \textsuperscript{254}

This interpretation also fails to recognize the fact that the emergence of the doctrine in the United States also coincided with expanded interstate commerce and the arrival of a national railroad system. \textsuperscript{255} For example, as noted earlier, one of the

\textsuperscript{247} See \textit{Stangvik}, 819 P.2d at 25 (warming up to the suggestion that factors relating to the conveniences of securing witnesses and accessing proof may be of lesser consequence in an era of “modern transportation and transmission methods”).

\textsuperscript{248} See supra text accompanying note 147.

\textsuperscript{249} See supra text accompanying note 210.

\textsuperscript{250} See supra text accompanying note 247.

\textsuperscript{251} See supra text accompanying note 242.

\textsuperscript{252} See King, supra note 5, at 1117 (arguing that the doctrine must change to accommodate the changes that come from the development of a global economic community because “traditional notions of ‘borders’ become anachronistic in an age of global trade and interdependent cultures”); see also discussion supra Part I; supra note 22 and accompanying text.

\textsuperscript{253} King, supra note 5, at 1115–16 (noting that the doctrine in federal courts developed at a time when “international business dealings were uncommon and even interstate transactions were limited”).

\textsuperscript{254} See discussion supra Part II.

\textsuperscript{255} See Barrett, Jr., supra note 33, at 382–86 (commenting how the forum non conveniens doctrine is a promising way of dealing with suits for personal injuries against railroads when such suits are brought by employees under FELA in states far removed from the place of injury); see also Friedman, supra note 75, at 300 (explaining the impact, from about 1840, of the railroad locomotive on the American legal system, especially tort law, because “[t]he railroad engine swept like a great roaring bull through the countryside, carrying out an

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reasons that the doctrine acquired popularity in the U.S. was that the courts started using it as a counterbalance to the increased litigation they were experiencing after the passage of FELA. In California, it was a FELA-related claim dealing with a railroad worker who alleged he was hurt twice at work that gave the state supreme court the first opportunity to use the doctrine to dismiss a claim due to “inconvenience.” Therefore, the timing suggests that the doctrine has traditionally evolved as a reaction to the realities of trade and commerce, and in recognition of the administrative pressures that national and international commerce, and the ensuing litigation the transactions might generate, may place on our judicial system.

IV. FORUM NON CONVENIENS POST-STANGVIK—KEEPING CALIFORNIA COURTS OPEN TO FOREIGN PLAINTIFFS

A. The Great Northern Multi-Factor List—What’s Left After Stangvik

In Great Northern, the court of appeals compiled a list of twenty-five public and private factors for forum non conveniens balancing. Stangvik did not directly address how the Great Northern factor list was affected by the high court’s 1991 decision. Nonetheless, since courts continue to refer to the list in their opinions, a review of the post-Stangvik status of the Great Northern factors is merited. The factors could be grouped into four general categories: plaintiff’s access to an alternative forum (Factors #1, 7, 24); private interest factors dealing with matters of convenience in participating in a trial and presenting each parties’ best case (Factors #2, 6, 8, 9, 10, 16); factors dealing with the parties’ relationship to the forum, or what could be referred to as jurisdictional issues (Factors #4, 5, 12); and public interest matters (such as burden to the judicial system, interest of state economic and social revolution”).

256. See id. at 383 n.14 (“A survey conducted by 51 leading railroads showed that during a five year period ending in 1946 some 2,512 suits were filed outside the federal district in which the accident occurred or in which the plaintiff resided at the time of the accident”).

257. See supra note 12 and accompanying text.

258. This, after all, was Blair’s point when he described how American courts were already using the doctrine as they tried to sort out a number of commercial transactions between parties in different states, or different countries. See Blair, supra note 7, at 22, nn.102-04.

259. See supra note 192 and accompanying text.


261. See supra note 192.

262. Id.

263. Id.
in litigation) (Factors #3, 11, 15, 18, 19, 20, 21, 22, 23). Which of these factors are still relevant in a forum non conveniens analysis post-Stangvik?

1. Plaintiff’s Access to an Alternative Forum (Factors #1, 7, 24)

Stangvik reasserted the importance of these factors as part of the threshold question to be answered prior to engaging in private and public interest balancing. Great Northern lumped them in as part of a list of factors that were to be balanced against each other, but Stangvik held that such application was inappropriate. So long as the action can be commenced in the alternative jurisdiction, a valid judgment obtained there against the defendant, and some remedy is afforded for the plaintiff, an alternative forum exists. If an alternative forum exists, the courts can proceed with the balancing of the private factors of the parties, and the public interests affected by the litigation.

Since Stangvik, courts for the most part have followed this rule and begun their analysis with the threshold inquiry regarding the availability of an alternative forum. What happens if this framework is not followed? If a court fails to follow Stangvik’s threshold inquiry framework, the reaction by the Supreme Court may be swift and negative.

In Seaman v. Pfizer Inc., the court of appeals considered whether or not to dismiss a shareholders’ derivative action on the grounds that the California court was an inconvenient forum. Although Pfizer was a Delaware corporation, and all of the members of the company’s board resided outside California, several of the defendants working for the company’s subsidiary Shiley were California residents,

264. Id.
266. See, e.g., Chong v. Superior Court, 68 Cal. Rptr. 2d 427, 431 (1997) (“The threshold question is whether Hong Kong provides a suitable alternative forum.”). See also Boaz v. Boyle & Co., 46 Cal. Rptr. 2d 888, 895 (1995) (“We agree that the issue of suitability of an alternative forum is a threshold determination, and not part of the discretionary analysis.”); Ford Motor Co., 41 Cal. Rptr. 2d. 342, 346 (1995) (“In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternative forum is ‘suitable’ place for trial.”).
267. See Seaman v. Pfizer Inc., previously available in 9 Cal. Rptr. 2d 477 (1992) (letting the decision stand but ordered depublished by the California Supreme Court on September 24, 1992 because the court misapplied Stangvik by placing the balancing of private factors first in its analysis, without first determining the threshold inquiry regarding the appropriateness of the alternative forum). “The majority states that, ‘Once inconvenience is established, it is then appropriate to search for an alternative forum, not before.‘ I believe that misstates the law.” Id. at 483 (Moore, J., dissenting).
268. See id. at 478–79 (considering whether the trial court erred when it dismissed the case on forum non conveniens grounds). The derivative action was brought on Pfizer’s behalf against its officers and directors alleging fraud and mismanagement in the company’s acquisition of Shiley Inc. Id. Shiley had been involved in extensive litigation over the manufacturing and marketing of heart valves. See generally, Stangvik v. Shiley, Inc., 819 P.2d at 16 (providing the facts surrounding the litigation resulting from the death of two men who received heart valves manufactured by Shiley); Shiley Inc. v. Super. Ct. of Orange County, 6 Cal. Rptr. 2d. 38, 39-40 (1992) (providing details regarding plaintiffs who “filed complaints for damages, asserting product liability and related claims arising from the implantation of petitioners’ heart valves at hospitals outside California”).
many of the events surrounding the claim occurred in California, and witnesses to these events resided in California. In its analysis, the court did not begin with the threshold inquiry whether the plaintiff had an alternative forum, but instead it considered whether California was an inconvenient forum. It made the inconvenience determination by looking at the private factors, such as the connection of both parties to the state. Additionally, the court looked at public factors and asserted that California had an interest in the litigation because a "very serious wrongdoing is alleged to have occurred here." Because of the strong connection of the parties to the state, and the belief that California had an interest in the litigation, the court held that it was inappropriate to dismiss the case and that "the trial court should have gone no further because it is immaterial that another state might also qualify as a convenient forum."

In his dissent Justice Henry T. Moore, Jr. warned the court that the majority's analysis was contrary to the holding in Stangvik. He noted that "(i)nconvenience" is not a threshold question, but a conclusion to be reached by a trial court after it has properly applied the forum non conveniens analysis and that "(h)ere, the majority has placed the cart before the horse." Barely three months after the court of appeals issued its decision, the California Supreme Court, without comment, ordered the opinion be not officially published.

In hindsight, Justice Moore's admonition that the court was misapplying Stangvik by failing to engage in a threshold inquiry regarding the appropriateness of an alternative forum seems to be on target. A suggestion that the Pfizer court misapplied Stangvik is further buttressed by the fact that, in the same year, the California Supreme Court refused to review a court of appeals decision which articulated the threshold inquiry framework. In Shiley Inc. v. Super. Ct. of Orange County, the court of appeals asserted that, following Stangvik, the first part of a

269. See Seaman v. Pfizer Inc., 9 Cal. Rptr. 2d at 479 (establishing that there was a nexus between Pfizer's actions and California).
270. See supra text accompanying note 266.
271. See Seaman v. Pfizer Inc., 9 Cal. Rptr. 2d at 481-82 (noting that the plaintiffs, while out-of-state residents, are merely representatives of a class that "surely includes thousands of California shareholders" and that a California company and its officers were among the alleged wrongdoers). "The court also considered the private interests of the litigants and the interests of the public in retaining the action for trial in California ........" Id. at 484.
272. Id. at 482.
273. Id. at 481.
274. Id. at 483 (anchoring the dissent on a belief that "the majority departs from the forum non conveniens analysis set forth in Piper Aircraft Co. v. Reyno and Stangvik v. Shiley, Inc., and ignores the role of an appellate court in reviewing the trial court's decision on this matter") (cites omitted). The majority distinguished the Pfizer case from Stangvik by stating the main issue raised in Stangvik dealt with a question of damages, not liability as in Pfizer, and that the evidence regarding damages was to be found in Scandinavia. See id. at 480 n.6.
275. Id. at 483.
276. Id.
277. See Shiley Inc. v. Super. Ct. of Orange County, 6 Cal. Rptr. 2d. 38, 41 (1992) (noting that Stangvik provides the appropriate standards to be applied in deciding forum non conveniens motions, beginning with the threshold questions is whether the plaintiffs' home states are suitable places for trial).
forum non conveniens analysis required determining whether or not an alternative forum existed for plaintiff’s claim.\(^\text{278}\) Once this was done, the court could proceed with the balancing of private interests of the parties, followed by the public interest of the state.\(^\text{279}\) This analytical approach seems to have met the approval of the state’s highest court.\(^\text{280}\)

Because the threshold inquiry regarding the suitability of alternative forum is so critical to how a forum non conveniens motion to dismiss will be resolved, a number of cases following Stangvik have dealt with the question regarding what exactly makes an alternative forum suitable or unsuitable.\(^\text{281}\) In Shiley Inc. v. Super. Ct. of Orange County, the court of appeals concluded that “so long as there is jurisdiction and no statute of limitations bar, a forum is suitable where an action ‘can be brought,’ although not necessarily won.”\(^\text{282}\) Similarly, the court in Boaz v. Boyle & Co.\(^\text{283}\) interpreted the alternative forum inquiry tightly, so that it would require a showing that the “alternative forum is a foreign country in which the courts are not independent, or due process is not applied” before the court would conclude that the other forum is not suitable.\(^\text{284}\)

In Chong v. Super. Ct. of Los Angeles County, the issue of how independent the courts in an alternative forum must be in order to meet the “suitable” test arose as a key issue. The case dealt with a business transaction between the plaintiff, a Hong Kong business known as HBZ, and two citizens of Hong Kong.\(^\text{285}\) The defendants had signed a personal guarantee for debt incurred by a California company.\(^\text{286}\) When the California company failed to meet its obligation, HBZ obtained a judgment

\(^{278}\) See id. (articulating the threshold inquiry framework).

\(^{279}\) Id. at 44 (noting that the superior court failed to consider these private and public factors and should therefore be required to reconsider the defendant’s motion for a stay on forum non conveniens grounds).


\(^{281}\) See Chong v. Superior Court, 68 Cal. Rptr. 2d 427, 431 (1997) (holding that plaintiff’s assertion that Hong Kong courts will not provide due process after the Chinese government takes over is not evidence to establish that Hong Kong is not an alternative forum.); Boaz v. Boyle & Co., 46 Cal. Rptr. 2d 888, 894 (1995) (holding that the ‘no remedy at all’ exception... applies only in rare circumstances, such as where the alternative forum is a foreign country in which the courts are not independent, or due process is not applied,” and does not apply to a sister state).

\(^{282}\) Shiley Inc. v. Super. Ct. of Orange County, 6 Cal. Rptr. 2d 38, 42 (1992). The court also notes that the alternative forum decision is apart from the balancing of private and public interests. Id.

\(^{283}\) See Boaz v. Boyle & Co., 46 Cal. Rptr. 2d at 894 (citing Stangvik and Shiley Inc. v. Super. Ct. of Orange County as interpreting the alternative forum inquiry as a procedural inquiry regarding the ability to file a claim in a particular forum, versus discussions regarding the effects on the plaintiff’s claims of the alternative forum’s substantive law or whether the alternative forum even recognize the cause of action).

\(^{284}\) Id.

\(^{285}\) Chong v. Superior Court, 68 Cal. Rptr. 2d at 429 (explaining the business transaction between Artone (USA) Inc., a corporation based out of California, HBZ, a Hong Kong lending concern, and Mr. Kavon Chong and Ms. Kwan Ying Ping, both citizens of Hong Kong, although Ms. Ping’s primary residence was in California).

\(^{286}\) See id. and accompanying text.
from the Hong Kong Supreme Court against the defendants.\textsuperscript{287} The plaintiff also filed a suit in California against the two defendants.\textsuperscript{288} The trial court refused to dismiss the case on forum non conveniens grounds because it was concerned that "the transfer of Hong Kong from British to Chinese control would destroy HBZ's opportunity to receive a fair trial."\textsuperscript{289} The court of appeals reversed the decision, holding that Hong Kong (the alternative forum) was adequate. The court noted that even though Hong Kong was in the process of becoming part of China, and that there were real questions regarding how independent the judiciary would remain once it was absorbed by China, it was not sufficient to render the forum inadequate.\textsuperscript{290} The \textit{Chong} court distinguished the case from other situations like those found in "Iran, Ecuador, and Chile" where "there was evidence that the judiciary would not provide due process; no such evidence was presented in this case."\textsuperscript{291} Therefore, to successfully argue that an alternative forum is not suitable, a showing of proof that there is actual denial of due process, not mere speculation based on "unsubstantiated claims," is needed.\textsuperscript{292}

Finally, at least one California court has held that the fact that not all defendants in an action may be subject to jurisdiction in the alternative forum does not make the alternative forum unsuitable.\textsuperscript{293}

\textit{2. Private Interest Factors Dealing with Matters of Convenience in Participating in a Trial and Presenting Each Parties' Best Case (Factors #2, 6, 8, 9, 10, 16)}

Fundamental to the doctrine of forum non conveniens is the court's concern that a plaintiff, by seeking forum in the state, is trying to harass and vex the defendant. Therefore, questions regarding the burdens of getting proof and securing witnesses are important in helping measure whether there is an enough connection between the defendant and the state so that the defendant would not be too inconvenienced
by having the trial there. Conversely, if the connection with the state is so tenuous that having the trial there would be of great expense to the defendant, this fact may allow the court to infer that the main reason the plaintiff selected this forum was to harass the defendant enough to, perhaps, force a settlement.

The vexing or harassing standard can be traced back to some of the earliest forum non conveniens cases both in the United States and England.\(^{294}\) Although the words are used in tandem, seldom do the courts engage in an explanation regarding the terms’ particular application in a given case.\(^{295}\) The importance of the private interest factors is precisely that the factors help delineate what constitutes vexatious and harassing conduct on the part of the plaintiff. Therefore, this set of factors remains critical in any post-\textit{Stangvik} forum non conveniens analysis.

Note, however, that the court in \textit{Stangvik} recognized how communication and technological advances may eventually impact some of the factors dealing with difficulties of getting witnesses to present their testimony, or access to proof. In the future, these factors may become less relevant.\(^{296}\)

3. Parties’ Relationship to the Forum (Jurisdictional Issues) (Factors #4, 5, 12)

\textit{Stangvik}’s holdings had little, if any, impact on this set of factors.\(^{297}\) This does not mean, however, that these factors should remain immune to a review regarding their relevancy. At first glance, factors dealing with defendant’s principal place of business (Factor #4), whether the situation, transaction or event occurred in, or had substantial relationship to the state (Factor #5), and whether parties have a relationship to the state which imposes upon them an obligation to participate in judicial proceedings (Factor #12) appear misplaced in a forum non conveniens analysis. As the California statute and court decisions point out, “[t]he doctrine of forum non conveniens is not jurisdictional. The doctrine involves a trial judge declining to exercise jurisdiction which otherwise exists.”\(^{298}\) In this context, these factors seem out of place in a forum non conveniens analysis.

Could these factors serve other purposes? Inasmuch as they may help determine whether or not the foreign plaintiff’s main motive in filing the claim in the state was

\(^{294}\) See supra note 48 and accompanying text.
\(^{295}\) See, e.g., Gulf Oil, 330 U.S. 501, 509 (1947) (using the terms but not explaining them); Price, 268 P.2d 457, 461 (1954) (“It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.”).
\(^{296}\) See \textit{Stangvik} v. Shiley, Inc., 819 P.2d 14, 25 (1991); see also supra note 247 and accompanying text.
\(^{297}\) As noted earlier, \textit{Stangvik}’s impact is focused on reestablishing the alternative forum threshold inquiry, rejecting the presumption that the plaintiff’s forum selection should remain undisturbed even when the plaintiff is a nonresident, and rejecting that part of the private factor balancing includes considerations regarding the effect of the alternative forum’s substantive law on the plaintiff’s claim. See discussion supra Part III.F.
to harass or vex the defendant, factors dealing with whether the defendant’s principal place of business or whether the parties have a connection to the state may be useful. If the purpose of these factors is to help determine whether the plaintiff’s selection of forum is farfetched, then it would seem that there is not much difference between these factors and those dealing with the private interests of the parties described in subsection 2 above.

One area where the factors retain some relevancy is in determining whether or not the defendant is a resident of the state. Stangvik retained the presumption of convenience to a defendant if the defendant is a resident. Therefore, factors dealing with a defendant’s principal place of business, whether the situation, transaction or event occurred in, or had substantial relationship to the state, and whether parties have a relationship to the state which imposes upon them an obligation to participate in judicial proceedings, remain relevant to a foreign plaintiff inasmuch as they help establish the defendant’s status as a California resident. This residency will give rise to a presumption that the defendant will not be inconvenienced if the trial proceeds in California.

4. **Public Interest Matters (Such as Burden to Judicial System, Interest of State in the Litigation) (Factors #3, 11, 15, 18, 19, 20, 21, 22, 23)**

*Stangvik*’s holding expressively rejected the use of Factor #3 (the difference in conflict of law rules applicable in California and in the alternative forum). Therefore, any forum non conveniens analysis that includes this factor may run afoul. *Stangvik* also ruled that it “is [correct] that preventing court congestion resulting from the trial of foreign causes of action is an important factor in the forum non conveniens analysis.” Therefore, factors dealing with “avoidance of overburdening local courts with congested calendars, [and] protecting the interest of potential jurors so that they are not called upon to decide cases in which the local community has little concern” must be appropriately addressed by the plaintiff when facing a forum non conveniens challenge. These factors relate back directly to the doctrine’s policy originally articulated by Blair in 1929.

The burden to a court can sometimes be counterbalanced by evidence that the state has a strong interest in regulating the conduct in question. In *Stangvik*, the court acknowledged the argument as significant, although, in that case, it was not enough to counter the state’s concern that hundreds of similar claims might end up flooding the courts should that action be allowed to proceed. However, in its 1995 *Ford Motor Co. v. Ins. Co. of N. Am.* decision, the court of appeals ruled that the

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299. *See* Stangvik (holding that the presumption of convenience remains in effect for a resident defendant); *see also* supra note 243 and accompanying text.
301. *See* discussion supra Part II.
public interests weighed in favor of the plaintiff when California had an interest in regulating the conduct of the defendant.\(^\text{303}\) In that case, Ford Motor Company was trying to get its insurance carrier to pay for liabilities arising from the environmental contamination of various plant sites.\(^\text{304}\) Three of the sites were in California. The defendant was not a California corporation, nor did it have its principal place of business in the state.\(^\text{305}\) The trial court granted the insurer's motion to dismiss on forum non conveniens grounds.\(^\text{306}\)

The court of appeals, in reversing the judgment, concluded that, since "California, too, has a fundamental interest in the preservation of the quality of the natural environment and in the remediation of toxic contamination within its borders,"\(^\text{307}\) the public factors weighed in favor of the plaintiff, even though neither the plaintiff nor the insurer were California residents. Furthermore, the court noted California had a policy to encourage the general availability of insurance coverage for environmental pollution cleanup.\(^\text{308}\) To the Ford Motor court, availability of funds to deal with environmental damage was so important that the court dismissed any suggestion that the claim would lead to calendaring and congestion problems.\(^\text{309}\) The court concluded that "California has a substantial interest in regulating the conduct at issue in this case. The burden imposed on California courts thus will not be disproportionate to the state’s relationship to the cause of action . . . ."\(^\text{310}\) In summary, if a non-resident plaintiff can establish that California has a strong interest in the litigation, and that the number of related claims that the court may

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\(^{303}\) See Ford Motor Co., 41 Cal. Rptr. 2d. 342, 347 (1995) (stating that two of the more important factors to be considered by the courts should be "California’s interest in regulating the conduct involved and the public’s interest in the case").

\(^{304}\) See id. at 344 (providing the factual background of the case). "After the discovery of groundwater contamination at the site in the early 1980s, the California Regional Water Quality Control Board, the Santa Clara Valley Water District and the Milpitas Fire Department began investigating the contamination. Since then, they have undertaken remedial measures. To date, the cost of the remediation exceeds $5 million; the final total cost could be substantially greater." Id.

\(^{305}\) See id. at 345.

\(^{306}\) See id. (noting that the plaintiff argued that the trial court abused its discretion in granting the defendant's motion to dismiss).

\(^{307}\) Id. at 348.

\(^{308}\) See id. (pointing to California case law that identified that the state had a substantial interest in making sure that insurance coverage is available for environmental cleanup).

\(^{309}\) See id. at 349 (recognizing that California courts do suffer from problems with calendaring and congestion).

\(^{310}\) Id.
face is manageable from an administrative standpoint, a foreign plaintiff has an opportunity to argue the public factors in his or her favor.

B. A Foreign Plaintiff’s Recipe to Surviving a Forum Non Conveniens Motion

Why is identifying which Great Northern factors are still relevant to any use an attorney representing a foreign plaintiff? The obvious answer is that irrelevant factors will do little to sway a court. A better reason may be that taking a fresh look at the factors listed and relating them back to the original goals of the policy, may help identify the more persuasive arguments for a foreign plaintiff. For example, as discussed in Part II, the traditional policy reasons behind the American version of the doctrine, addressed procedural justice between the parties (ensure plaintiffs have an alternative forum to go to; ensure that the predominant reasons for selecting the forum is not to harass or vex the defendant) versus judicial efficiency. Therefore, nonresident plaintiff attorneys facing a forum non conveniens motion to dismiss or stay for claims arising from resident defendant’s out of state activities would do well to engage in a critical review of contemporary forum non conveniens multi-factor lists.

Applying the Great Northern factors alone would provide incomplete answers. Stangvik and its progeny indicate that some of the Great Northern factors have become, or are becoming, irrelevant in forum non conveniens analysis. For example, courts should no longer consider disadvantages to the plaintiff of the alternative forum’s substantive law as a factor in their forum non convenient analyses. Additionally, Stangvik and its companion cases indicate that the alternative forum inquiry is critical to determine whether or not the court will move forward in its analysis of private interest factors. If no alternative forum exists, the court must retain the case.

311. Of course, it is for the court to consider that it can manage the additional claims that may flow from the trial to proceed in California is elusive. We know that in Ford, in addition to the three sites in the case, the company had at least two more sites in the state that were contaminated and that could lead to future litigation in the state. See id. at 344 (noting that Ford Motor Company subsidiaries were connected with contaminated sites in Palo Alto and Newport Beach). On the other hand, we also know that in Stangvik, the court was concerned with the possibility that there were 108 cases involving the Shiley valve that could end up in California courtrooms should dismissal be denied. Stangvik v. Shiley, Inc., 819 P.2d 14, 26 (1991) (“If we hold that the present cases may be tried in California, it will likely mean that the remaining 108 cases . . . will also be tried here.”).

312. See Gevurtz, supra note 118, at 854–56 (noting that identifying the specific facts that lead to shareholder liability is critical in diffusing the confusion usually generated by the invocation of multiple factors, and providing guidance for future analysis).

313. See discussion supra Part IV.A.1, 2.

314. See discussion supra Part III.F.

315. See id.

316. See id.
Alternatively, if an alternative forum exists, then the court can proceed with balancing the interests of the parties with the public’s interest in the litigation.\textsuperscript{317} And from \textit{Stangvik} and the subsequent cases, we can glean some meaning from the narrowly-tailored definition of “alternative.” A suitable alternative forum exists if the alternative forum can assert jurisdiction over the defendant, no statute of limitations bars the claim, and a judgment against the defendant can be enforced.\textsuperscript{318}

For our hypothetical Mexican plaintiff, a Mexican court would provide a suitable alternative forum for the following reasons: first, a claim can be filed there; second, Mexico’s civil code recognizes negligence claims;\textsuperscript{319} and third, remedies are available once negligence is proven.\textsuperscript{320} Furthermore, since a California defendant would likely agree to jurisdiction in Mexico in order to avoid a California jury, theoretically, access to a Mexican court would not be a problem.

An attorney would next need to examine the following: the factors outlined in subsections 2 and 3 above, the private interest factors dealing with matters of convenience in participating in a trial and presenting each party’s best case (\textit{Great Northern} Factors #2, 6, 8, 9, 10, 16), and the parties’ relationship to the forum (\textit{Great Northern} Factors #4, 5, 12). The key to this part of the analysis is to try to establish that the plaintiff’s choice of forum was not for the purpose of vexing or harassing the defendant. In our hypothetical, because the software manufacturer is a California resident and the equipment was designed and manufactured in the state, the plaintiff’s choice of forum seems reasonable and should not lead the court to infer that Plaintiff is suing in California simply to vex or harass the Defendant corporation.

If the court is convinced that the plaintiff does not mean to vex or harass the defendant, and both sides can make a reasonable argument on whether the forum is convenient, then the court engages in the last prong of the analysis: whether the litigation could overburden the court. Here the court focuses, not so much on present burden, but on how a particular claim will burden the courts in the future, i.e., how asserting jurisdiction over the present claim will open the floodgates. If the

\begin{itemize}
  \item \textsuperscript{317} See id.
  \item \textsuperscript{318} See id.
  \item \textsuperscript{319} \textit{See Of Obligations Which Arise From Illegal Acts}, C.C.D.C. art. 1910, translated in \textit{The Mexican Civil Code} (Michael Wallace Gordon trans., Oceana Publications 1980) [hereinafter \textit{Of Obligations}] (“He who acting illegally or against good customs causes damages to another, is obliged to repair it, unless he proves that the damage occurred in consequence of the fault or inexplicable negligence of the victim.”); \textit{see also AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM} 43–44 (1978) (“Article 1910 of the civil code provides ... [the] sweeping principal of liability [that] covers the entire area of intentional torts, negligence, defamation, deprivation of goods ("conversion"), interference with business interests, etc.”).
  \item \textsuperscript{320} \textit{See Of Obligations}, C.C.D.C. art. 1915 (providing limitation of damages in a tort claim); \textit{see also AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM}, supra note 319, at 44 (noting that the resulting limitations in §1915 provide a “typical recovery of damages in a personal injury or death action [that] is much less than one would expect to find in Anglo-American jurisdictions”); Symposium, supra note 8, at 126 (noting that the particular jurisdiction’s law applied in Mexican tort cases is crucial because “Mexican tort law is a bad law for the plaintiffs to use because the damages awarded will be rather small”).
\end{itemize}
hypothetical Mexican businessman can argue that his litigation will not result in a multitude of similar causes of action, then he stands a better chance of defeating a motion to dismiss.

Similarly, even if multiple claims may follow, if the Mexican plaintiff can point to how similar malfunctions are hurting California residents, then, as in Ford Motor the courts may find that the state has a substantial interest in ensuring the safety of its residents. Additionally, if he can make the connection that the state has an interest in regulating a particular activity, then he strengthens his position. The thrust of this argument may depend, however, on whether some damage or injury has already occurred, such as the environmental damage in Ford Motor.

In sum, although contrary to the general perception that Stangvik signaled the closing of the court doors to foreign plaintiffs, the decision provided a road map for a forum non conveniens analysis that helps foreign plaintiffs focus their arguments against dismissals. By reinstituting the analytical framework developed in Gulf Oil, as adopted by the California courts in Price, Stangvik assured that the policies underlying the forum non conveniens doctrine, as opposed to other social or political agendas, are the ones governing the courts’ application of this procedural tool.

V. CONCLUSION

Close to seventy-five years ago, Lord Sumner warned, “I do not see how one can guide oneself profitably by endeavoring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interest of both that the case should be tried in the best way . . . .”321 In other words, balancing the conveniences of the parties against each other may be dangerous. Today, echoes of the same concern remain: what really propels a court to conclude that one party is more inconvenienced than the other? And if the plaintiff is a foreigner, added suspicion follows: is the court moved by bias, or is it motivated, as U.S. Supreme Court Justice Brennan said, by a fear of too much justice?322

This Comment suggests that a fear of too much justice, in the form of overcrowded courtrooms, burdened dockets, and bankrupted courts does influence forum non conveniens consideration. After all, it was Paxton Blair’s suggestion in 1929 that the doctrine could be used to control the flow of litigation in the United States that gave life to the doctrine throughout state and federal courts. Judicial administration, however, is just part of it.

By going behind the often quoted and misapplied list of multiple factors to decipher the policies that give these factors meaning, we are reminded of other

important policies that govern the doctrine’s application. First, justice for the plaintiff in the context of forum non conveniens means that the plaintiff has at least one place to go for relief. Second, justice for the defendant means not allowing the plaintiff to use forum selection as a mechanism for harassment and vexation. And lastly, justice for the taxpayers who support the judicial system means that, in cases where an alternative forum exists, but the private parties’ inconveniences are in parity, the court will consider the impact that asserting jurisdiction on the future operation of the court. Thus focused, a foreign plaintiff has a very clear understanding of the doctrine’s application and can tailor his or her arguments accordingly.