MARK C. DURKIN, ADMINISTRATOR (ESTATE OF ANDREW CONSTANTINIDIS), ET AL. *v.* INTEVAC, INC., ET AL.

(SC 16386)

Sullivan, C. J., and Borden, Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.

Argued February 13—officially released October 30, 2001

Counsel

Mark R. Kravitz, with whom were *Jeffrey R. Babbin* and, on the brief, *Victor A. Bolden*, *Patrick J. Corcoran*, *Kevin C. Shea*, *Patrick M. Noonan*, *Frank J. Silvestri, Jr.*, *S. Dave Vatti*, *Charles S. Tusa*, *Charles P. Reed*, *Donald E. Frechette* and *Christopher J. Lynch*, for the appellants (defendants).

Vincent M. Musto, with whom, on the brief, were *Rosalind J. Koskoff* and *Joel T. Faxon*, for the appellees (plaintiffs).

Janet C. Spegele, *Cynthia L. Amara* and *Loretta M. Smith* filed a brief for the Connecticut Business and Industry Association et al. as amici curiae.

Opinion

ZARELLA, J. This is a products liability action arising

out of a military helicopter collision that occurred in Australia on June 12, 1996. The primary issue in this interlocutory appeal[1] is whether the trial court abused its discretion in denying the defendants' motions to dismiss on the ground of forum non conveniens. We conclude that the doctrine of forum non conveniens requires that the action be dismissed. Accordingly, we reverse the decision of the trial court to the contrary.

On June 12, 1996, in Northern Queensland, Australia, two Australian military Black Hawk helicopters collided in midair and crashed during a training exercise, killing eighteen military personnel and injuring several others. The plaintiffs, who all are Australian citizens, are either persons injured in the collision or the estates of persons killed in the collision. The plaintiffs brought this action in Connecticut in several counts based on products liability, negligence and breach of express and implied warranties. The plaintiffs alleged that the collision was caused by, inter alia, design or manufacturing defects in the night vision goggles and the helicopters used in the training exercise. The defendants,[2] which were involved in the manufacturing process of either the night vision goggles, the helicopters or devices used therewith, moved to dismiss the complaint on the ground of forum non conveniens. The trial court denied the defendants' motions. This certified interlocutory appeal followed.

The relevant facts are derived from the plaintiffs' complaint, the affidavits filed in support of and in opposition to the defendants' motions to dismiss and a certain Board of Inquiry[3] summary, described more fully later in this opinion, which the defendants submitted in support of their evidentiary contentions. On June 12, 1996, members of the Australian Army's Special Air Service Regiment were conducting training with members of the Army's Fifth Aviation Regiment at the High Ridge Training Area in Northern Queensland. The training included a nighttime, live fire exercise during which the Special Air Service troops would rappel from helicopters in a simulated attack on a terrorist encampment. The training was in preparation for the 2000 Sydney Olympics.

At approximately 6:45 p.m., one of the six helicopters participating in the exercise made physical contact with another helicopter. The main rotor blades from the first helicopter sliced through the fuselage and the tailboom of the second helicopter, causing damage to the second helicopter's control and guidance systems, an engine, the cargo compartment, the structural frame and one of its fuel tanks. The fuel from the ruptured fuel tank of the second helicopter came into contact with the first helicopter's engine and caused an explosion between the aircraft, both of which caught fire. The collision sheared the main rotor blades from the first helicopter, causing it to roll to the left and eventually

crash to the ground; the first helicopter exploded upon contact with the ground and was consumed by fire. The second helicopter lost control, spun and eventually crashed to the ground. Fire, fed by ignited fuel from a ruptured fuel cell, spread throughout the second helicopter.

Eleven occupants of the first helicopter and seven occupants of the second helicopter were killed in the crash. The eighteen deaths constituted the largest peacetime military disaster in Australia since 1964.

After the accident, the Chief of the General Staff of the Australian Army convened a Board of Inquiry (board) to investigate the accident, determine its causes and make recommendations designed to prevent future accidents from occurring.[4] The board conducted investigations, interviewed 144 witnesses, generated over 7000 pages of records and transcripts and reported its findings. The 144 witnesses were nearly all Australian military personnel, and among them were: persons who had survived the crash; persons who had witnessed the crash; persons who had planned the training exercise; persons responsible for the safety of planning; persons responsible for the maintenance of the equipment involved; and persons responsible for the training of Australian military personnel. The board reported fourteen ''primary causes'' and twenty-four ''contributory factors'' of the accident. Among the causes and contributory factors were: (1) deficiencies in leadership in carrying out the training exercise; (2) aircrew error; (3) inadequate planning; (4) lack of sufficiently experienced aircrew members; and (5) failure to ''make proper allowance for'' the limitations and characteristics of night vision goggles in view of the lighting conditions and objectives of the training exercise.[5]

The plaintiffs alleged in their complaint that the collision ''was caused by the failure of the night vision goggles to enable the crew members of one helicopter to adequately determine the location of the other helicopter,'' and that this failure was the result of the negligence of certain defendants, namely, Intevac, Inc., Litton Industries, Inc., ITT Industries, Inc., Hoffman Engineering Corporation, Raytheon Optical Systems, Inc., and Gentex Corporation, in designing, testing and manufacturing the goggles, testing devices used in conjunction with the goggles and the helmets to which the goggles were secured. The plaintiffs also alleged that a certain defect in the Black Hawk helicopter, which was designed and manufactured by one of the defendants, United Technologies Corporation, caused the collision.

In their motions to dismiss and memoranda of law in support thereof, the defendants argued that Connecticut would be an inconvenient forum in which to defend. The defendants argued that an analysis of the relevant factors set forth in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S.

501, 508–509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), and *Picketts* v. *International Playtex, Inc.*, 215 Conn. 490, 576 A.2d 518 (1990), favored an Australian forum.

In advancing this claim, the defendants urged the trial court to balance the hardships that would befall the parties depending upon which forum ultimately was selected. In particular, the defendants highlighted the difficulties that they would encounter in mounting a defense in the Connecticut forum in light of the fact that all sources of proof documented in the report of the extensive board investigation were located in Australia. The defendants claimed that most, if not all, of their witnesses were beyond the compulsory process of a Connecticut court. The defendants further argued that the board report squarely affixed responsibility for the accident on human error and a poorly planned training exercise, conclusions that were gleaned from evidence that is located in Australia. Finally, the defendants noted that trying the case in the Connecticut forum would prevent them from impleading the Australian government as a third party defendant for contribution purposes.

The plaintiffs contended, inter alia, that the defendants' motions to dismiss should be denied because many of the sources of evidence necessary to prove their products liability action were located in Connecticut. The plaintiffs noted that four of the defendants, including United Technologies Corporation, had significant operations or, at least, were located, in Connecticut. The plaintiffs argued that, because of the limited discovery allowed in Queensland, and the additional complications posed by the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,[6] the plaintiffs would be unable to discover documents and depose witnesses located in Connecticut adequately.

The trial court, relying on *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 490, and *Miller* v. *United Technologies Corp.*, 40 Conn. Sup. 457, 515 A.2d 390 (1986), denied the defendants' motions. The trial court first determined that Australia was an adequate alternative forum, rejecting the plaintiffs' contention that Australia was an inadequate alternative forum because the "likely . . . costs of prosecuting the case to trial in Queensland would exceed the realistic, potential recovery should the action be successful." (Internal quotation marks omitted.) The court also rejected the plaintiffs' claim that, because of the expense involved in trying the case in Queensland, and because Australia does not permit contingency fee arrangements, they would be unable to obtain counsel.

Thereafter, the court balanced the relevant private interest factors. The factors that the court considered were: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for

attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; (3) the possibility of viewing the accident scene if such viewing is appropriate to the action; (4) the enforceability of a judgment; (5) the relative advantages and obstacles to fair trial; and (6) all other practical problems that make trial of a case easy, expeditious and inexpensive.''[7] (Internal quotation marks omitted.) The court concluded that the private interest factors favored Connecticut as the appropriate forum.

Although the trial court's determination that the private interest factors favored Connecticut as the appropriate forum constituted the decisive factor in denying the defendants' motions to dismiss, the court also considered the public interest factors. The court considered the following factors: ''(1) administrative difficulties for the courts, i.e., court congestion and the court's familiarity with the applicable law; (2) imposing the burden of jury duty on [the] people of a community with no relation to the litigation; (3) holding trial in the view of interested persons; and (4) having matters decided in their local forum.''[8] (Internal quotation marks omitted.) The court concluded that, ''[e]ven though public interest factors favor Australia, the private interest factors favor Connecticut. The private interest factors . . . outweigh the public interest factors.'' Accordingly, the trial court denied the defendants' motions to dismiss on the ground of forum non conveniens. The trial court also concluded that the motions to dismiss filed by certain defendants, namely, Intevac, Inc., United Technologies Corporation, Litton Industries, Inc., Gentex Corporation, Hoffman Engineering Corporation and Raytheon Optical Systems, Inc., did not ''invoke'' Practice Book § 10-30[9] or § 10-32.[10]

I

The defendants claim that the trial court abused its discretion in denying their motions to dismiss on the ground of forum non conveniens. We agree.

We begin with the applicable standard of review and the well established legal principles that guide our analysis of the defendants' claim. A ruling on a motion to dismiss for forum non conveniens is reviewed under an abuse of discretion standard. *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 500; *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, 212 Conn. 311, 319, 562 A.2d 15 (1989); cf. *Irish National Ins. Co., Ltd.* v. *Aer Lingus Teoranta*, 739 F.2d 90, 92 (2d Cir. 1984). ''As a common law matter, the doctrine of forum non conveniens vests discretion in the trial court to decide where trial will best serve the convenience of the parties and the ends of justice. . . . In our application of the abuse of discretion standard, we must accept the proposition that simply to disagree with the [trial] court as if the facts had been presented to this court in the first instance cannot be the basis of our decision.'' (Citations

omitted; internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 500. "[T]he trial court's exercise of its discretion may be reversed only upon a showing of clear abuse. [W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." (Internal quotation marks omitted.) *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, supra, 319. "Meaningful review, even from this circumscribed perspective, nonetheless encompasses a determination whether the trial court abused its discretion as to either the facts or the law. . . .

"Emphasis on the trial court's discretion does not, however, overshadow the central principle of the forum non conveniens doctrine that unless the balance is strongly in favor of the defendant[s], the [plaintiffs'] choice of forum should rarely be disturbed. . . . Although it would be inappropriate to invoke [a] rigid rule to govern discretion . . . it bears emphasis that invocation of the doctrine of forum non conveniens is a drastic remedy . . . which the trial court must approach with caution and restraint. The trial court does not have unchecked discretion to dismiss cases from a [plaintiffs'] chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff[s]. . . . Although a trial court applying the doctrine of forum non conveniens must walk a delicate line to avoid implicitly sanctioning forum-shopping by either litigant at the expense of the other . . . it cannot exercise its discretion in order to level the playing field between the parties. The [plaintiffs'] choice of forum, which may well have been chosen precisely because it provides the plaintiff[s] with certain procedural or substantive advantages, should be respected unless equity weighs strongly in favor of the defendant[s]. . . .

"[T]he overriding inquiry in a forum non conveniens motion is not whether some other forum might be a good one, or even a better one than the [plaintiffs'] chosen forum. The question to be answered is whether [the plaintiffs'] chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved. . . . Accordingly, the trial court, in exercising its structured discretion, should place its thumb firmly on the [plaintiffs'] side of the scale, as a representation of the strong presumption in favor of the [plaintiffs'] chosen forum, before attempting to balance the private and public interest factors relevant to a forum non conveniens motion.

"When, as in the present action, the plaintiffs are foreign to their chosen forum, the trial court must readjust the downward pressure of its thumb, but not remove it altogether from the plaintiffs' side of the scale. Even though the plaintiffs' preference has a diminished

impact because the plaintiffs are themselves strangers to their chosen forum . . . Connecticut continues to have a responsibility to those foreign plaintiffs who properly invoke the jurisdiction of this forum . . . especially in the somewhat unusual [situation in which] it is the forum resident who seeks dismissal. . . . [Therefore] [w]hile the weight to be given to the choice of a domestic forum by foreign plaintiffs is diminished, their entitlement to a preference does not disappear entirely. The defendants challenging the propriety of this choice continue to bear the burden to demonstrate why the presumption in favor of [the plaintiffs'] choice, weakened though it may be, should be disturbed.'' (Citations omitted; internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 500–502.

With these principles in mind, we turn to the four step process for examining forum non conveniens claims outlined in *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 508–509, and clearly set forth in *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 784–85 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981), which we have stated is a ''useful frame of reference for the law of Connecticut.'' *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 497; see *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, supra, 212 Conn. 319. First, the court should determine whether an adequate alternative forum exists that possesses jurisdiction over the whole case. *Pain* v. *United Technologies Corp.*, supra, 784. Second, the court should consider all relevant private interest factors with a strong presumption in favor of—or, in the present case, a weakened presumption against disturbing—the plaintiffs' initial choice of forum. Id. Third, if the balance of private interest factors is equal, the court should consider whether any public interest factors tip the balance in favor of trying the case in the foreign forum. Id. Finally, if the public interest factors tip the balance in favor of trying the case in the foreign forum, ''the court must . . . ensure that [the] plaintiffs can reinstate their [action] in the alternative forum without undue inconvenience or prejudice.'' Id., 784–85.

We agree with the trial court's conclusion that Australia is an adequate forum. On appeal, the plaintiffs do not claim otherwise, and this view is consistent with findings by other courts that Australia is an adequate forum. See, e.g., *Allstate Life Ins. Co.* v. *Linter Group Ltd.*, 994 F.2d 996, 1001–1002 (2d Cir.), cert. denied, 510 U.S. 945, 114 S. Ct. 386, 126 L. Ed. 2d 334 (1993) (securities fraud); *Great Prize, S.A.* v. *Mariner Shipping Party, Ltd.*, 967 F.2d 157, 160 (5th Cir. 1992) (dispute regarding ownership of property); see also *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Sup. 1469, 1475 (N.D. Ala. 1995) (product liability for silicone gel breast implants). Accordingly, we do not disturb the trial court's conclusion concern-

ing this threshold issue.

The plaintiffs also do not challenge the trial court's conclusion that the *public* interest factors favor trying the case in Australia. Thus, the balancing of the private interest factors is dispositive of the defendants' forum non conveniens claim. We are persuaded that the defendants adequately have demonstrated that the private interest factors sufficiently weighed in favor of dismissal to overcome the diminished deference accorded to the foreign plaintiffs' choice of forum.

We agree with the trial court that the relevant private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; (3) the possibility of viewing the accident scene if such viewing is appropriate to the action; (4) the enforceability of a judgment; (5) the relative advantages and obstacles to a fair trial; and (6) all other practical problems that make the trial of a case easy, expeditious and inexpensive. *Gulf Oil Corp*. v. *Gilbert*, supra, 330 U.S. 508. We examine each of these factors in turn, keeping in mind that, consistent with the flexibility necessary in a forum non conveniens analysis, no single factor should be given undue weight. See, e.g., *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 249–50, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (''[i]f central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable'').

The assessment of the relative ease of access to sources of proof and the availability of witnesses for trial generally requires that the trial court become ''entangled in the merits of the underlying dispute.'' *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988). As the dissent aptly notes, to examine such factors, ''the court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the [plaintiffs'] cause of action and to any potential defenses to the action.''

In the present case, the defendants argue that all sources of proof documented in the board's report of its exhaustive investigation are located in Australia, and that the board found that negligence in the planning and operation of the training exercise, and not poorly or defectively engineered aircraft or night vision goggles, caused the accident. Specifically, the board identified fourteen primary causes and twenty-four factors that contributed to the accident, none of which implicated the design or manufacturing integrity of the Black Hawk helicopter or the night vision goggles.[11] The board found that the design and performance of the Black Hawk helicopter and the night vision goggles, aside from the

inherent limitations of the latter; see footnote 5 of this opinion; were not causes of the accident.[12] We note that the plaintiffs have offered no evidence to show that that military hardware was defective or was a cause of the accident. We recognize that the defendants bore the burden of demonstrating that the case should be dismissed, and we review this case, as did the trial court, as one sounding in products liability. Nevertheless, we also view the board's unequivocal finding that the accident was caused by poor planning and implementation, and not by defective products, as highlighting the importance of access to the board's report and the evidence and statements of witnesses upon which that report was based. In this connection, we note that the board convened under the direction of the Chief of the General Staff of the Australian Army and, in light of the fact that the board's findings that inadequate planning, training and negligence on the part of certain military personnel caused the accident were against the interests of the Australian Army, there is no reason to discredit the board's findings.

The accessibility of evidence in the present case is affected by the operation of international pretrial discovery procedures. Both Australia and the United States are signatories to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Hague Convention). Although the Hague Convention guides and expedites the procurement of evidence in international disputes, its operation has been called ''far from perfect.'' *Pain* v. *United Technologies Corp.*, supra, 637 F.2d 788; cf. *Lony* v. *E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991) (''Hague Convention procedures assure that some evidence from each forum will be available in the other''). Article 10 of the Hague Convention[13] authorizes a party seeking to employ a foreign court's compulsory powers in order to obtain evidence to file a ''Letter of Request.'' *Pain* v. *United Technologies Corp.*, supra, 788 n.67. When such a request is filed, ''the recipient nation's executing authority is required to assist an American court with such compulsory force as its own courts can exercise in a pretrial evidentiary situation . . . .'' Id., 788. There are various ways in which countries can opt out of complying with such a request, however. For example, the Hague Convention authorizes signatories to decline to execute letters of request if ''the State addressed considers that its sovereignty or security would be prejudiced thereby.'' Hague Convention, art. 12 (b), 23 U.S.T. 2562. Moreover, the Hague Convention contains a provision allowing signatories to opt out of executing letters of request for pretrial discovery of documents. Id., art. 23, 23 U.S.T. 2568.[14] Every signatory to the Hague Convention, with the exception of the United States, has invoked article 23 and opted out of executing letters of request. E.g., *Pain* v. *United Technologies Corp.*,

supra, 788 n.69. Thus, it appears that if the case were to be tried in Australia, Connecticut would be bound to execute any letters of request originating in Australia, provided that the United States did not decide that its sovereignty would be prejudiced by execution of those letters of request. See Hague Convention, art. 12 (b), 23 U.S.T. 2562. On the other hand, if the case were tried in Connecticut, Australia might not execute letters of request from the United States in light of the fact that Australia previously has opted out of executing letters of request under article 23 of the Hague Convention.

The defendants submitted a uniform offer to the trial court, which provided that, if this action were dismissed on the ground of forum non conveniens and brought in Australia, they would provide proper discovery.[15] The defendants' offer is nearly identical to offers upon which numerous other courts have relied in dismissing, on the ground of forum non conveniens, actions filed by foreign plaintiffs in American courts. See, e.g., *Kilvert* v. *Tambrands, Inc.*, 906 F. Sup. 790, 791, 798 (S.D.N.Y. 1995); cf. *Dowling* v. *Hyland Therapeutics Division, Travenol Laboratories, Inc.*, 767 F. Sup. 57, 60 (S.D.N.Y. 1991). Notwithstanding the defendants' stipulation, Queensland civil procedure rules provide for pretrial discovery, including depositions and interrogatories.[16]

With regard to the availability of compulsory process to compel unwilling witnesses—the second factor in our analysis—the defendants bear the burden of identifying the key witnesses and establishing generally what their testimony will cover. *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 509. The defendants must go beyond a "mere assertion" that the evidence is in another forum; id., 510; and must establish who the key witnesses are and that their testimony is material. Id., 509–10. "Requiring extensive investigation [however] would defeat the purpose of [the defendants'] motion [to dismiss]." *Piper Aircraft Co.* v. *Reyno*, supra, 454 U.S. 258. A hearing on a motion to dismiss on the ground of forum non conveniens, therefore, reflects "both the preliminary nature of the question and the counterproductivity of substantial discovery before dismissing an action so that it can be reinstituted elsewhere." *Lony* v. *E.I. Du Pont de Nemours & Co.*, supra, 935 F.2d 614. As this court has reasoned, "a motion for dismissal on the ground of forum non conveniens [by necessity] must be heard on a record that is less specific than [the court] would require for a trial on the merits." *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, supra, 212 Conn. 321.

We conclude that the defendants have established that key witnesses would be unavailable if the case were to remain in Connecticut. The defendants submitted information about witnesses to the trial court, consisting of portions of the board's report, along with indexes, which showed the names and, where applica-

ble, the military statuses of those witnesses. The board's report derived, in part, from information discovered at hearings conducted over a three month period, at which 144 witnesses gave testimony and during which 217 exhibits were submitted. The defendants represented to the trial court that they would call many of the 144 witnesses in defense of this action. The board's report identifies each witness and refers to the pages of the transcript at which each witness' testimony can be found and to any exhibits that are relevant to a witness' testimony. In addition, the defendants specifically identified four witnesses that they intend to call at trial, all of whom reside in Australia, and the substance of their testimony. For example, the testimony of the only pilot to have survived the collision, Captain D.K. Burke, occupied over 100 pages of transcript. The defendants identified other important witnesses who survived the collision, including Wing Commander K.P. Roberts, Lieutenant R.J.A. Garvey and Major R. Crowe. Additionally, the defendants identified three other Australian servicemen, namely, Major J.W. Phasey, Lieutenant Colonel O.E. Aberle and Sergeant M.R. White, whose testimony regarding the condition of the helicopters immediately before the training exercise would be essential to defend the action. The foregoing witnesses, and almost all of the 144 witnesses listed in the report, are former or current military personnel who reside in Australia. We conclude that the defendants' presentation of this information to the trial court was sufficient to meet the minimum standard for placing a trial court on notice that there are "crucial witnesses [who would be] located beyond the reach of compulsory process . . . ." *Piper Aircraft Co.* v. *Reyno*, supra, 454 U.S. 258.

The facts of this case distinguish it from *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 490. In *Picketts*, the plaintiff brought an action in Connecticut to recover damages for his wife's death from toxic shock syndrome, which allegedly was caused by the defendants' defectively designed tampon. Id., 491. The defendants, in support of their motion to dismiss on the ground of forum non conveniens, submitted an affidavit from only one physician, who stated that he could not conclusively determine that the defendants' product was the cause of death. Id., 510. The defendants in *Picketts* did not present affidavits from the attending physicians in Canada, where the decedent was treated unsuccessfully for toxic shock syndrome, to show that they were unavailable to testify in Connecticut. Id., 510–11.

It is undisputed that, if the present case were to be tried in Connecticut, the parties would be unable to compel the attendance of unwilling, nonparty witnesses located in Australia. Cf. *Pain* v. *United Technologies Corp.*, supra, 637 F.2d 787 n.57. On the other hand, should the case be tried in Australia, the defendants all have entered into a stipulation pursuant to which they

will "make their personnel and records available [to the plaintiffs] for litigation in Australia . . . ."[17] In addition, as we previously noted, pretrial discovery procedures are available under Queensland civil procedure rules.[18]

The trial court concluded that "[t]he defendants [did] not sufficiently [establish] that the key witnesses to the case would be unavailable for trial in Connecticut," and, thus, that "there is no evidence indicating that the difficulties and costs that the defendant[s] may experience in transporting documentary evidence and in compelling unwilling witnesses to testify in Connecticut would be any greater than the difficulties and costs the plaintiffs may experience if litigation occurred in . . . [Australia]." (Internal quotation marks omitted.) The trial court apparently relied on the notion, as stated in its memorandum of decision, that "[i]t is difficult to imagine after *Picketts* that [the] granting of a forum non conveniens motion would ever be sustained, particularly in light of the [Connecticut] Supreme Court's reference to modern technological innovations such as . . . airplanes, satellites and videotaped depositions." (Internal quotation marks omitted.)

We conclude that, because the defendants established that crucial witnesses will be unavailable if the action remains in Connecticut, and because the balance of hardships regarding access to evidence appears to favor neither forum, the trial court abused its discretion in concluding that, together, these factors did not favor dismissal. We emphasize that *Picketts* should not be read to support the proposition that technology has replaced the need for personal attendance of witnesses. To be sure, in *Picketts*, we did note that "the advent of . . . videotaped deposition[s] [has] greatly transformed the meaning of 'compulsory process' in a forum non conveniens calculus." *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 511. Nevertheless, we did conclude in *Picketts* that, when "litigants cannot compel personal attendance and [are thus] forced to try their cases on deposition, [this situation] create[s] a condition not satisfactory to the court, jury or most litigants . . . ." (Citation omitted; internal quotation marks omitted.) Id.

In addressing the possibility of viewing the accident scene if appropriate, we examine the record to determine if this factor favors dismissal. The trial court concluded that " 'videotapes, pictures, diagrams, schematics and models' " would be more instructive than a view of the actual accident scene. To the contrary, a careful review of the board's report reveals that this accident occurred in a mountainous region of Australia used for training by the Australian Army, in a location where the topography affected the performance of the aircrews and the flight patterns of the helicopters. Indeed, the board found that the military

personnel responsible for coordinating and planning the training exercise incorrectly had diagramed the terrain. In addition, the particular lighting in the area at the time of day at which the collision occurred apparently played a role in the collision. Our review of the board's report reveals that viewing the accident scene is a factor that favors dismissal. We conclude that the trial court improperly gave no weight to this factor.

Another factor is the enforceability in the United States of a judgment rendered in Australia. The trial court did not address this factor. Nevertheless, the defendants have jointly stipulated that they will adhere to and abide by any judgment rendered in an Australian forum. We, therefore, conclude that the enforceability of a judgment rendered in an Australian forum, a factor that the trial court failed to consider, does not weigh against dismissal.

The next factor, namely, the relative advantages and obstacles to a fair trial, encompasses the defendants' ability to implead third parties. The trial court acknowledged that the defendants would be unable to implead third parties if the case were to remain in Connecticut, and that this inability would create difficulty for the defendants. The trial court concluded, however, that, "[d]espite the defendants' inability to implead other defendants, the private interest factors favor Connecticut as a forum." This court has made it clear that, even when a factor is insufficient, by itself, to outweigh a plaintiff's choice of forum, that factor is not irrelevant. *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, supra, 212 Conn. 322. Other courts have called the inability to implead third party defendants a "major factor . . . militating in favor of dismissal . . . ." *Pain* v. *United Technologies Corp.*, supra, 637 F.2d 790.

In the present case, it is undisputed that the defendants cannot implead the Australian government or the Australian Army as third parties if this action remains in Connecticut. Furthermore, the dissent's suggestion that "the defendants could pursue a separate indemnification action against the crew and pilots in the courts of Australia" is not feasible. Such a circumstance—holding one trial in Connecticut and another in Australia—would not only impose greater costs and inconvenience on the parties but also would make settlement impossible. We, therefore, conclude that the inability to implead third parties is a factor that, under the circumstances of this case, weighs significantly in favor of dismissal.[19]

The final private interest factor includes all other practical problems that make trial of a case easy, expeditious and inexpensive. The trial court did not consider this factor. Some courts have dismissed cases on the ground of forum non conveniens when dealing with actions involving airplane or helicopter accidents in foreign countries that are brought in the United States

by plaintiffs that are foreign to the jurisdiction. See, e.g., *Piper Aircraft Co.* v. *Reyno*, supra, 454 U.S. 238; *Pain* v. *United Technologies Corp.*, supra, 637 F.2d 779–80; *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1028 (3d Cir. 1980). In *Pain* and *Dahl*, governmental agencies of the countries in which the accidents had occurred conducted investigations into the nature and causes of the accidents. *Pain* v. *United Technologies Corp.*, supra, 779; *Dahl* v. *United Technologies Corp.*, supra, 1030. In those cases, dismissals were premised upon the ready availability of evidence gathered as a result of the investigations and witnesses being located in the alternate forum, as well as the inconvenience of conducting the trial in the United States. See *Pain* v. *United Technologies Corp.*, supra, 786–88; *Dahl* v. *United Technologies Corp.*, supra, 1031. In the present case, the board's extremely thorough findings, which derived from over 7000 pages of records and transcripts of interviews with 144 witnesses, were based on evidence located in Australia. We, therefore, conclude that this factor, which the trial court failed to consider, also favors dismissal.

The trial court concluded that the defendants' hardships did not outweigh the plaintiffs' choice of forum. We conclude, however, that the trial court afforded too much deference to the plaintiffs' preference and failed to balance the combination of private interest factors favoring dismissal against the plaintiffs' preference. Considering all of the private interest factors together—particularly, the unavailability of important evidence and several key witnesses and the defendants' inability to implead other parties—and including the factors that the trial court failed to consider, we conclude that the defendants would face substantial hardships if the action were to remain in Connecticut, and that those hardships outweigh the diminished presumption in favor of the foreign plaintiffs' choice of forum, especially in light of the defendants' stipulations as to discovery and jurisdiction.[20] Accordingly, we conclude that the trial court abused its discretion in denying the defendants' motions to dismiss on the ground of forum non conveniens.

II

As an alternate ground for affirmance, the plaintiffs also claim that the trial court improperly concluded that the motions to dismiss filed by three of the defendants, namely, Hoffman Engineering Corporation, Raytheon Optical Systems, Inc., and Gentex Corporation, did not invoke Practice Book § 10-30[21] or § 10-32.[22] We disagree.

In opposition to the defendants' motions to dismiss, the plaintiffs, citing Practice Book §§ 10-30 and 10-32, argued that the defendants were required to file all motions to dismiss within thirty days of filing their appearances. The trial court concluded that Practice Book §§ 10-30 and 10-32 were not applicable to these

motions because a motion to dismiss on the ground of the common-law doctrine of forum non conveniens ''does not contest the court's jurisdiction, venue or [sufficiency] of process within the meaning of [Practice Book §§] 10-30 and 10-32 . . . .'' (Internal quotation marks omitted.)

We agree with the trial court's conclusion that Practice Book §§ 10-30 and 10-32 are inapplicable to motions to dismiss on the ground of forum non conveniens because such a motion does not contest the court's jurisdiction. See, e.g., *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, supra, 212 Conn. 314. A court that decides to dismiss a case on the ground of forum non conveniens has jurisdiction but elects to dismiss the case and defer to another forum. Id.; see also *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 507 (''[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute''). We, therefore, conclude that the trial court properly determined that the motions to dismiss filed by Hoffman Engineering Corporation, Raytheon Optical Systems, Inc., and Gentex Corporation did not invoke Practice Book § 10-30 or § 10-32.

The decision is reversed and the case is remanded to the trial court with direction to grant the defendants' motions to dismiss on the ground of forum non conveniens, subject to the conditions[23] agreed upon by the defendants.

In this opinion SULLIVAN, C. J., and BORDEN, NORCOTT, PALMER and VERTEFEUILLE, Js., concurred.

[1] The Chief Justice granted the defendants' petition for certification to appeal pursuant to General Statutes § 52-265a and Practice Book § 83-1.

General Statutes § 52-265a provides: ''(a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

''(b) The Chief Justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice.

''(c) Upon certification by the Chief Justice that a substantial public interest is involved and that delay may work a substantial injustice, the trial judge shall immediately transmit a certificate of his decision, together with a proper finding of fact, to the Chief Justice, who shall thereupon call a special session of the Supreme Court for the purpose of an immediate hearing upon the appeal.

''(d) The Chief Justice may make orders to expedite such appeals, including orders specifying the manner in which the record on appeal may be prepared.''

Practice Book § 83-1 provides in relevant part: ''Prior to filing an appeal pursuant to General Statutes § 52-265a, the party seeking to appeal shall, within two weeks of the issuance of the order or decision of the superior court, submit an original plus three copies of an application for certification by the chief justice (1) stating the question of law on which the appeal is to be based, (2) describing the substantial public interest that is alleged to be involved, and (3) explaining why delay may work a substantial injustice. . . .''

[2] The defendants are Intevac, Inc., a California corporation with its principal place of business in Santa Clara, California; United Technologies Corporation, a Delaware corporation with its principal place of business in Hartford; Raytheon Optical Systems, Inc., formerly known as Hughes Danbury Optical Systems, Inc., a Delaware corporation with its principal place of business in Danbury; Hoffman Engineering Corporation, a Delaware corporation with its principal place of business in Stamford; Litton Industries, Inc., a Delaware corporation with its principal place of business in Woodland Hills, California; ITT Industries, Inc., an Indiana corporation with its principal place of business in White Plains, New York; and Gentex Corporation, a Delaware corporation with its principal place of business in Carbondale, Pennsylvania.

[3] Lieutenant General John Murray Sanderson, Chief of the General Staff of the Australian Army, established a Board of Inquiry comprised of appointed military personnel to inquire into the causes of and circumstances surrounding the June 12, 1996 collision of the Black Hawk helicopters and to make recommendations on the basis of its findings.

[4] See footnote 3 of this opinion.

[5] The board heard evidence that night vision goggles generally have physical limitations and characteristics, namely:

"a. a limited and maximum field of view . . . of [forty] degrees (compared with 210 [degrees] for normal human day vision);

"b. limitations on the ability to accurately discern depth, distance and rate of closure due to the absence of normal stereoscopic vision;

"c. a monochromatic (green and black) display;

"d. a heightened susceptibility to visual perception illusions; and

"e. visual acuity approximately half as good as normal vision."

The board ultimately found that, notwithstanding these limitations and characteristics, "the [night vision goggles] in use on this mission [were] the best commercially available at the time . . . ."

[6] Opened for signature March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

[7] The trial court quotes *Miller* v. *United Technologies Corp.*, supra, 40 Conn. Sup. 463, in listing these factors. These factors were derived from the United States Supreme Court's decision in *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 501. See id., 508.

[8] The trial court quotes *Miller* v. *United Technologies Corp.*, supra, 40 Conn. Sup. 466, in listing these factors, which, in turn, cites, among other cases, *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 508.

[9] Practice Book § 10-30 provides in relevant part: "Any defendant, wishing to contest the court's jurisdiction, may do so even after having entered a general appearance, but must do so by filing a motion to dismiss within thirty days of the filing of an appearance. . . ."

[10] Practice Book § 10-32 provides: "Any claim of lack of jurisdiction over the person or improper venue or insufficiency of process or insufficiency of service of process is waived if not raised by a motion to dismiss filed in the sequence provided in Sections 10-6 and 10-7 and within the time provided by Section 10-30."

[11] The board summarized those causes as follows:

"a. [A]ircraft unserviceability in [1994 and 1995] which reduced the opportunity for pilots to gain experience and proficiency in flying [counterterrorism/special recovery operation] missions;

"b. [H]igh pilot separation rates which further eroded the experience base of [the Fifth Aviation Regiment];

"c. [I]nadequate and untimely joint exercise planning between [the Special Air Service Regiment] and [the Fifth Aviation Regiment];

"d. [I]nadequate supervision and checking of delegated exercise planning tasks by responsible superior commanders;

"e. [I]ncomplete and uncoordinated reconnaissance of the exercise site, including inadequate air photography of [Fire Support Base] Barbara;

"f. [I]naccurate diagrammatic representation of [Fire Support Base] Barbara which was used for briefing both [the Special Air Service Regiment] ground assault teams and [the Fifth Aviation Regiment] aircrews;

"g. [C]hanging the flight profile and direction for the night mission from that which had been [practiced] in the day airmobile assault;

"h. [E]mploying a complex flight formation which permitted no individual aircraft manoeuvre flexibility, and with no abort procedure [practiced], under [night vision goggle] conditions on a tight objective with no vertical identifying features;

"i. [A]ppointing an inexperienced Flight Lead to lead the formation on a combined arms, live firing, [night vision goggle], three aircraft abreast airmo-

bile assault mission;

''j. [F]ailure of the Air Element Commander . . . to exercise command and control of the formation in the air because of his involvement as the flying pilot of one of the assault helicopters; and

''k. [F]ailure of the [Air Element Commander] or any other pilot to inform Flight Lead that he was off track and that difficulty in identifying individual roping and firing points was being experienced.''

[12] Generally, the board found that ''no equipment malfunction or failure contributed to [the] accident.'' Specifically, the board found that ''no fault is attributed to Black Hawk aircraft for any aspect of [the] accident.'' In addition, the board found ''that the crashworthy design of [the] Black Hawk [helicopter] materially contributed to the survival of [the] occupants of [the second helicopter] . . . .''

The board's findings with respect to night vision goggles identified poor planning in light of the known limitations of night vision technology. The board found deficiencies in ''implementing changes to the mission between the day mission and the night . . . mission without [the] benefit of rehearsal'' and in the ''failure to make proper allowance for the known characteristics and limitations of [night vision goggles], especially with respect to . . . the extraordinary demands on aircrew to maintain aircraft separation in a three aircraft line abreast formation [and] the mode of terrain flight . . . height and airspeed while using [night vision goggles] contrary to Army Flying Order 2.7.6 . . . .''

[13] Article 10 of the Hague Convention provides: ''In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.'' Hague Convention, art. 10, 23 U.S.T. 2561–62.

[14] Article 23 of the Hague Convention provides: ''A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.'' Hague Convention, art. 23, 23 U.S.T. 2568.

[15] The defendants specifically agreed to ''make their personnel and records available for the litigation in Australia'' and agreed to ''consent to the reopening of [this] action in Connecticut [if that condition is] not met as to any proper defendant in [the] action.''

[16] The defendants and plaintiffs each submitted affidavits from attorneys in Australia concerning pretrial discovery procedures and policies in that country, along with copies of the local rules. Depositions are permitted under Queensland civil procedure rules. E.g., Queensl. Civ. P. r396 (1999) (''[t]he court may, for obtaining evidence for use in a proceeding, order the examination on oath of a person before a judge, magistrate or another person appointed by the court as an examiner''). In addition, depositions may be admitted at trial. Queensl. Civ. P. r407 (1999). Finally, other discovery tools exist, such as interrogatories and mechanisms for compelling non-party disclosure.

[17] See footnote 15 of this opinion.

[18] While the dissent concedes that depositions are available in Queensland, it maintains, on the basis of an affidavit from the plaintiffs' expert witness, John Anthony Griffin, that depositions ''are not routine.'' Footnote 7 of the dissenting opinion. The defendants, of course, submitted an affidavit from their own expert, Patrick Anthony Keane, a Queen's Counsel and a Solicitor-General for the State of Queensland, whose opinion, not surprisingly, differed from that of the plaintiffs' expert regarding the extent to which the plaintiffs would be able to conduct pretrial discovery. Keane stated that, under Queensland rules of civil procedure, the plaintiffs would ''probably succeed'' in obtaining depositions of witnesses. Furthermore, Keane indicated that the Queensland rules of civil procedure would enable the plaintiffs to obtain relevant documents, interrogatories and evidence overseas. In light of these conflicting opinions, we are reluctant, as the trial court apparently was, to accord significant weight to the contentions of either party regarding the operation of pretrial discovery rules in Queensland.

The dissent suggests that, based on the difference in language between Queensl. Civ. P. r396 and Practice Book §§ 13-27 through 13-32 and 40-44 through 40-58, obtaining depositions is less likely in Australia than in Connecticut. See footnote 7 of the dissenting opinion and accompanying text. We note that the language of the relevant Australian and Connecticut rules is substantially the same, however. Compare Queensl. Civ. P. r396

("[t]he court may, for obtaining evidence for use in a proceeding, order the examination on oath of a person before a judge, magistrate or another person appointed by the court as an examiner") with Practice Book § 13-26 ("any party who has appeared in any civil action . . . where the judicial authority finds it reasonably probable that evidence outside the record will be required, may . . . take the testimony of any person, including a party, by deposition upon oral examination"). The difference is that, in Queensland, a party must secure a court order to conduct depositions whereas, in Connecticut, as a practical matter, a court order generally is not required. See generally Practice Book §§ 13-26 through 13-28.

Notwithstanding the issue of pretrial discovery, it remains undisputed that the defendants cannot compel important witnesses to *testify at trial*. Without several key witnesses at trial, who are beyond the compulsory process of Connecticut, we conclude that it would be unfair to require the defendants to establish their defense via videotaped depositions or by reading the transcripts of depositions into the record.

[19] We note that it is undisputed that the Australian government does not benefit from the doctrine of sovereign immunity and, thus, is subject to being sued in Australia. See generally *Groves* v. *Australia*, 40 A.L.R. 193, 197, 199 (Austl. 1982) (plaintiff could recover compensatory damages from Australian government for negligence of military personnel).

[20] See footnote 23 of this opinion.

[21] See footnote 9 of this opinion for the text of Practice Book § 10-30.

[22] See footnote 10 of this opinion for the text of Practice Book § 10-32.

[23] The defendants agreed to: "(1) consent to jurisdiction in Australia; (2) accept service of process in connection with an action in Australia; (3) make their personnel and records available for litigation in Australia; (4) waive any applicable statutes of limitation in Australia up to six months from the date of dismissal of this action or for such other reasonable time as may be required as a condition of dismissing this action; (5) satisfy any judgment that may be entered against them in Australia; and (6) consent to the reopening of the action in Connecticut in the event the above conditions are not met as to any proper defendant in this action."