

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

Spring 2020

Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice

Jayanth K. Krishnan

Indiana University Maurer School of Law, jkrishna@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Criminal Law Commons](#), [Judges Commons](#), and the [Litigation Commons](#)

Recommended Citation

Krishnan, Jayanth K., "Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice" (2020).
Articles by Maurer Faculty. 2945.

<https://www.repository.law.indiana.edu/facpub/2945>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington



**BHOPAL IN THE FEDERAL COURTS:
HOW INDIAN VICTIMS FAILED TO GET JUSTICE IN THE
UNITED STATES**

*Jayanth K. Krishnan**

ABSTRACT

*Over thirty-five years ago, the city of Bhopal, India, witnessed a horrific gas leak that originated from a facility operated by Union Carbide India Limited (“UCIL”), which had as its parent company the American-based Union Carbide Corporation (“UCC”). Thousands were killed, with many more injured. One hundred forty-five cases were filed throughout various U.S. federal district courts on behalf of the victims asserting that UCIL and UCC were liable. Eventually, these cases were consolidated through the multi-district litigation (“MDL”) process and placed onto the docket of federal Judge John Keenan. In 1986, Judge Keenan issued his famous *forum non conveniens* opinion, which stated that the Indian courts—and not the U.S. federal judiciary—were the proper venue for hearing these claims.*

Between 1986 and 1993, Judge Keenan dismissed all of the other MDL Bhopal cases he heard. Then, between 2000 and 2014 a set of distinct, non-MDL Bhopal matters appeared in front of

* Milt and Judi Stewart Professor of Law and Director of the Stewart Center on the Global Legal Profession, Indiana University Maurer School of Law. (Jkrishna@indiana.edu). The author is particularly indebted to Marc Galanter—who published one of his first articles, befittingly, in the 1961 issue of the *Rutgers Law Review*, on the rights of the needy in India—for his detailed comments and feedback on this project. See Marc Galanter, *Equality and “Productive Discrimination” in India*, 16 RUTGERS L. REV. 42 (1961). The author received incredibly constructive and supportive insights from Vitor Dias, Charles Geyh, Bert Kritzer, Ethan Michelson, Donna Nagy, Christiana Ochoa, Austen Parrish, and Tung Yin. Ashley Ahlbrand provided invaluable research support, and H.R. Sharma offered important historical background of the Bhopal litigation during the 2000s. The author is also grateful to Mitra Sharafi, the key visionary and architect of the University of Wisconsin-Madison Bhopal Archive. Valuable comments on this Article were also provided during workshops at the O.P. Jindal Global University (India), Indiana University Maurer School of Law’s Graduate Colloquium, and Cornell Law School’s Berger Center. For a classic book on efforts to “get justice,” see SALLY MERRY, *GETTING JUSTICE, GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

Judge Keenan. In all of these too, he issued dismissals. Indeed, the original MDL process—coupled with the existence of internal federal courthouse rules—created a type of path dependence, allowing for all of the Bhopal-Union Carbide matters to come before Judge Keenan.

The thesis here is that following the MDL consolidation, Judge Keenan became only more deeply wedded to the position he staked out back in 1986. Subsequent, non-MDL Bhopal plaintiffs, seeking an independent assessment of their claims, found themselves tethered to the initial MDL decision from years past. The broader lesson—beyond just this case study—is that in order for deserving plaintiffs to receive a fresh review in federal court, there needs to be an alternative imagination for how to deal with later cases that, although seemingly connected, are nevertheless distinct from the earlier MDL process.

TABLE OF CONTENTS

I. INTRODUCTION.....	706
II. THE FIRST MAJOR BHOPAL CASE AND ITS MDL PROGENY	713
A. <i>The 1986 Forum Non Conveniens Decision</i>	713
1. Battle of the Experts	713
2. Judge Keenan’s Evaluation of the Evidence	717
B. <i>The Remaining MDL Cases</i>	720
III. THE NON-MDL, BHOPAL-RELATED CASES.....	724
A. <i>The Sajida Bano Case</i>	724
B. <i>The Sahu Case(s)</i>	728
IV. HOW JUDGE KEENAN RECEIVED THE BHOPAL CASES AND THE RATIONALE OF HIS RULINGS.....	731
A. <i>The Process Angle</i>	731
B. <i>Substantive Concerns with the Rulings Themselves</i>	735
1. Returning to the 1986 Forum Non Conveniens Case.....	735
2. Other Concerns with the Later MDL Rulings	740
3. Concerns with the Later Non-MDL Cases	742
V. CONCLUSION.....	744

I. INTRODUCTION

The year 2019 marked thirty-five years since the world witnessed what was then deemed to be the most devastating toxic tort disaster ever seen. In December of 1984, the city of Bhopal, located in the central

2020] HOW INDIAN VICTIMS FAILED TO GET JUSTICE 707

region of India, saw an Indian subsidiary owned by the American parent company, Union Carbide, leak some thirty-two tons of methyl isocyanate gasses that were supposed to be used for the production of insecticides.¹ The gasses proceeded to spread steadily across the city.² The cold winter weather conditions trapped the fumes and suffocated large swaths of the population, inevitably increasing the injuries and death toll to horrifying levels.³ Although even to this day there remains no consensus on the exact number of people that were killed—the figures run from approximately 5,200 to 15,000 to 25,000—the damage of the Union Carbide gas leak can be still felt.⁴ Of those who survived, estimates are that over a half million residents were exposed to the gasses and continue to live with various types of injuries as a consequence.⁵

The legal events following the Bhopal disaster have been well-documented over the past three decades.⁶ Almost immediately, lawyers from around India and abroad—namely the United States⁷—descended

1. See e.g., Neeraj Santoshi, *Bhopal Disaster: So, How Many Died? 32 Years On, No One Sure*, HINDUSTAN TIMES (Dec. 3, 2016, 10:30 IST), <https://www.hindustantimes.com/bhopal/bhopal-disaster-so-how-many-died-32-years-on-no-one-sure/story-luLN0QaTxHlu05RTGNHOoI.html>. Also, in 2016, the University of Wisconsin-Madison established one of the foremost digital archives on the Bhopal tragedy. *Bhopal: Law, Accidents, and Disaster in India*, UNIV. WIS.: L. SCH. DIGITAL REPOSITORY, <https://repository.law.wisc.edu/s/uwlaw/page/bhopal-collection>. Compiling over 3600 sources (much of which was donated by Professor Marc Galanter), this website provides links and files that have documented the Bhopal tragedy. *Id.* It contains over 3600 sources, including books, articles, newspapers, other journalistic accounts, government reports, amici curiae, cases, and much more. *Id.*

2. Lisa Moscati Hawkes, *Parans Patriae and the Union Carbide Case: The Disaster at Bhopal Continues*, 21 CORNELL INT'L L.J. 181, 181 (1988).

3. See Apoorva Mandivilli, *The World's Worst Industrial Disaster Is Still Unfolding*, ATLANTIC (July 10, 2018) <https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/>.

4. See Santoshi, *supra* note 1.

5. See e.g., Prabhash K. Dutta, *Bhopal Gas Tragedy: What Happened this Day 33 Years Ago that Killed Thousands?*, INDIA TODAY (Dec. 7, 2017), <https://www.indiatoday.in/india/story/bhopal-gas-tragedy-what-had-happened-this-day-33-years-ago-that-killed-thousands-1099247-2017-12-03>.

6. For a range of important studies, see e.g., UPENDRA BAXI & AMITA DHANDA, VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE (1990); UPENDRA BAXI & THOMAS PAUL, MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE (1986); JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL (1993); KIM FORTUN, ADVOCACY AFTER BHOPAL: ENVIRONMENTALISM, DISASTER, AND NEW GLOBAL ORDERS (2001); Armin Rosencranz et al., *Legal and Political Repercussions in India, in LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL* 45–62 (Sheila Jasanoff ed., 1994); Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law*, 23 IND. J. GLOBAL LEGAL STUD. 15, 23–27 (2016); Marc Galanter, *Bhopal: 30 Years On*, UNIV. WIS.: L. SCH. DIGITAL REPOSITORY (Oct. 16, 2014), <https://repository.law.wisc.edu/s/uwlaw/page/bhopal-2014>; see also *Bhopal: Law, Accidents, and Disaster in India*, *supra* note 1.

7. See Hawkes, *supra* note 2, at 181.

upon Bhopal to see what services they could provide. A key issue upon which they focused was whom to hold primarily liable: the Indian subsidiary or the American parent company, Union Carbide.⁸ Questions also arose as to what role the Indian government ought to play.⁹ And of course, most importantly, there was the issue of how best to provide remedies to the victims and their families.¹⁰

In the weeks that followed, intensive discussions occurred among Indian government leaders and Indian and American plaintiffs' lawyers. These talks centered on whether a lawsuit on behalf of the victims should be brought in India or in the United States.¹¹ Ultimately, the decision was made that because the Indian courts suffered from tremendous backlogs as well as the fact that Indian law did not offer adequate mass tort remedies, the American lawyers representing the Bhopal victims would sue the parent company in the United States.¹² Thereafter, "some 145 purported class actions [were] filed in federal district courts across the United States."¹³

On January 2, 1985—exactly one month after the gas leak occurred—the American Judicial Panel on Multidistrict Litigation ("JPML") transferred these class actions to the U.S. District Court for the Southern District of New York ("SDNY"), where they then "became the subject of a consolidated complaint filed on June 28, 1985, before Judge John Keenan."¹⁴ Statutorily created in 1968, the JPML emerged as part of Congress' multidistrict litigation ("MDL") program, which was empowered to combine "civil actions involving one or more common questions of fact . . . pending in different districts, [to be] transferred to any [one] district [court and thereafter a respective judge] for coordinated or consolidated pretrial proceedings."¹⁵ During this same

8. See *infra* text accompanying notes 39–41.

9. See *infra* text accompanying note 16.

10. See discussion *infra* Part II (discussing what happened in the immediate aftermath of the Bhopal gas leak).

11. See discussion *infra* Part II.

12. See *infra* text accompanying notes 53–56.

13. *Bano Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 583 (2d Cir. 1993). For a discussion, at the time, of whether a parent company could be held liable, see Allin C. Seward III, *After Bhopal: Implications for Parent Company Liability*, 21 INT'L LAW. 695, 705 (1987). For a recent paper on how tort law in India has been updated to include the elimination of the public-private distinction and the adoption of the *parens patriae* and absolute liability principles, see Arpita Gupta, *Mass Tort Jurisprudence and Critical Epistemologies of Risk: Dissolution of Public-Private Divide in the Indian Mass Tort Law*, 40 LIVERPOOL L. REV. 227, 227 (2019).

14. See *Bano Bi*, 984 F.2d at 583.

15. See 28 U.S.C. § 1407 (2018); see also CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 13 (2016). In the later part of this paper, there is an extensive set of citations to the scholars who have been examining

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 709

period, the Indian parliament passed the Bhopal Gas Leak Disaster Act, which permitted the government of India to serve as the representative and trustee of the victims.¹⁶ Therefore, when the initial consolidated case was filed before Judge Keenan, it was the Indian government that was the party suing Union Carbide for injuring the victims in Bhopal.

In the spring of 1986, Judge Keenan issued his ruling.¹⁷ He dismissed the plaintiffs' case on forum non conveniens grounds and ruled that the matter ought to be heard and handled by the Indian judiciary.¹⁸ Judge Keenan's holding, at the time, received great attention from scholars, lawyers, and other observers. Yet, what has garnered much less scrutiny over the years is how a number of the assumptions within the opinion, in fact, lacked support then and, bluntly put, have not been able to stand the test of time. Moreover, even less well-known is that following this judgment, Judge Keenan issued an additional sixteen procedural rulings between 1986 and 2014 involving the Bhopal disaster.¹⁹ In not one of these decisions did the plaintiffs ultimately prevail.²⁰

the MDL process, particularly to Professor Andrew Bradt who has been a leading light in this field. See *infra* Part IV. Also, for many who study and follow the MDL process, the history of the famous Agent Orange litigation involving, first, Judge George C. Pratt and, subsequently, Judge Jack B. Weinstein is emblematic of this statute in action. For an overview of how this litigation (and then settlement) played out, see Ralph Blumenthal, *How Judge Helped Shape Agent Orange Pact*, N.Y. TIMES (May 11, 1984), <https://www.nytimes.com/1984/05/11/nyregion/how-judge-helped-shape-agent-orange-pact.html>; see also PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC TORT DISASTERS IN THE COURTS 97 (1986); John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356–58 (1995); John C. Coffee Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 319 (2010); Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2054 (2012).

16. The official name of the law was the Bhopal Gas Leak Disaster (Processing of Claims) Act March 29, 1985. *Bano Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 583 (2d Cir. 1993); see also Oscar Omar Salazar-Duran, *A Human Rights Approach to Corporate Accountability and Environmental Litigation*, 43 U.S.F. L. REV. 733, 752 (2009).

17. *In re Union Carbide Corp. Bhopal Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

18. *Id.* at 845.

19. See *infra* Part IV. These rulings spanned across five separate cases. One point that is important to remember is that these cases can be categorized as those that followed along the MDL, those that involved separate litigants who sued for damages based on the injuries caused by the 1984 gas leak, and those that involved separate litigants who sued for damages based on a lack of environmental remedial measures that Union Carbide had promised to undertake.

20. As the subsequent sections will discuss, some of these rulings that were appealed to the Second Circuit were remanded to Judge Keenan for further deliberation. However, ultimately, in not one of these matters did the Second Circuit allow the claimants to proceed with their claims—thereby siding with Judge Keenan's orders to dismiss. For a supportive piece of Judge Keenan's 1986 ruling, see generally Hawkes, *supra* note 2.

The argument of this Article has two aspects. First, there is an in-depth analysis of what might be called the federal judiciary's "Bhopal Jurisprudence."²¹ As will be suggested, as the years went on, Judge Keenan's rulings became increasingly more steadfast in terms of dismissing the different plaintiffs' claims that came before him. Even on those rare occasions when the Second Circuit Court of Appeals remanded a matter for Judge Keenan to reconsider, his ultimate conclusion was to find against the plaintiffs' side, which was not overturned by the appellate court. Of course, such outcomes would be completely understandable had each of these petitioners set forth weak cases or provided little *prima facie* evidence that did not justify their claims moving forward. However, in reality, the opposite occurred. The claims, legal arguments, and actual evidence—particularly in those matters during the 2000s—were strong and demonstrated that the plaintiffs should have at least been allowed to have their cases heard at trial. However, time after time, Judge Keenan issued judgments for the defendants, dismissing the cases.

Offering a detailed evaluation of Judge Keenan's Bhopal jurisprudence might make for an interesting paper on its own. However, the second part of this Article goes deeper, asking whether, upon reflection, Judge Keenan should have been allowed to serve as the sole judge for all of the Bhopal matters between 1986 and 2014. Recall that the above-referenced MDL process consolidated into a single complaint the 145 cases that were filed in 1985 and then brought them under Judge Keenan's authority.²² Subsequently, Judge Keenan issued his *forum non conveniens* decision in 1986 as well as three other MDL rulings in 1989, 1992, and 1993, respectively.²³

Starting in 2000, however, separate Bhopal cases, unrelated to the MDL, were filed in federal court. Yet, Judge Keenan remained as the only district court judge to hear these matters. Why? One might think that

21. This term has been used in the past by scholars. See e.g., UPENDRA BAXI, THE BHOPAL VICTIMS IN THE LABYRINTH OF THE LAW: AN INTRODUCTION, at lxviii (1990); Nehal Patel & Ksenia Petlakh, *Gandhi's Nightmare: Bhopal and the Need for a Mindful Jurisprudence*, 30 HARV. J. RACIAL & ETHNIC JUST. 151, 153, 158, 170–71, 184, 190 (2014). Additionally the blog, *Law and Other Things*, which focuses on law in South Asia, particularly India, has used this term in the past. Vasujith Ram, *Bhopal: Law, Accidents and Disaster, A Digital Archive Initiated by Marc Galanter*, LAW & OTHER THINGS (Nov. 2, 2016, 9:40 AM), <https://lawandotherthings.com/2016/11/bhopal-law-accidents-and-disaster/>.

22. *Bano Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 583 (2d Cir. 1993).

23. See *In re Union Carbide Corp. Gas Plant Disaster*, No. M21-38 (JFK), 1993 WL 541230 (S.D.N.Y. Dec. 28, 1993); *In re Union Carbide Corp. Gas Plant Disaster*, No. MDL 626, 1992 WL 36135 (S.D.N.Y. Feb. 18, 1992); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, No. 21-38 (JFK), 1989 WL 66673 (S.D.N.Y. June 14, 1989).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 711

these later cases would go through what is typically called the “random assignment”²⁴ process. However, as Professor Katherine Macfarlane has summarized, within the federal district court of the SDNY, the assignment system was also accompanied by the “related cases” rule, which has “allow[ed] judges to ‘accept’ later-filed cases if they [were] related to an earlier-filed case already on their docket.”²⁵ Professor Macfarlane notes that traditionally “[t]he decision to accept or reject the newly-filed case . . . [was] within the ‘sole discretion’ of the judge.”²⁶ Thus, a typical process might involve a plaintiff filing a case in federal court, which would first be randomly assigned to a judge by court staff. The defendant would then move to have that case transferred to a judge who had heard a “related case” in the past. The latter judge could then exclusively decide whether or not to take it.²⁷

Because of ongoing worries that moving parties, in such situations, were seeking to transfer cases to judges perceived to be more favorable to them, in 2013 the SDNY implemented certain changes to its related cases rule.²⁸ Today, a committee comprising “the chief judge and two other active judges” evaluate and can reject the request made by a party to transfer the case to a related case judge.²⁹ And simply because the legal issues or parties may be the same as a previous case does not necessarily mean that the two cases will be deemed as related any longer.³⁰

The purpose of the updated rules was to minimize how parties might game the assignment system as well as to reduce the unchecked power federal judges were amassing with respect to particular areas of law.³¹

24. See Katherine Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s ‘Related Cases’ Rule Has Shaped the Evolution of Stop-and-Frisk Law*, 19 MICH. J. RACE & L. 199, 205 (2014).

25. *Id.* at 203.

26. *Id.*

27. This example draws on lessons provided by Professor Macfarlane. *Id.* at 222–23. Professor Macfarlane’s work focuses on how the well-documented series of “stop-and-frisk” cases continually appeared on the docket of Southern District of New York Judge Shira Scheindlin, who, over the years, ruled against this policy. *Id.* at 220–25. Eventually, the Second Circuit publicly rebuked Judge Scheindlin on grounds of failing to be impartial and then removed her from hearing future such matters. *Id.* at 204–05, 242–46.

28. *Id.* at 245.

29. S.D.N.Y. L.R. 2; see also E.D.N.Y. L.R. 2; Macfarlane, *supra* note 24, at 245–46. Note, the 2018 rules are an updated version of the rules that were amended in 2013.

30. S.D.N.Y. L.R. 2; see also E.D.N.Y. L.R. 2; Macfarlane, *supra* note 24, at 245–46.

31. Professor Macfarlane cites to an essay written by Benjamin Weiser & Joseph Goldstein, which quotes Chief Judge Loretta Preska discussing the importance of transparency and her desire to reduce the influence that one judge can have over the law. Macfarlane, *supra* note 24, at 245–46 (citing Benjamin Weiser & Joseph Goldstein, *Federal Court Alters Rules on Judge Assignments*, N.Y. TIMES (Dec. 23, 2013), <http://www.nytimes.com/2013/12/24/nyregion/federal-court-alters-rules-on-judge-assignments.html>).

While Professor Macfarlane was writing on Section 1983 cases,³² her analysis is relevant to the mass tort context here as well—with an added layer offered. As she astutely notes—and rightly worries about—these updated rules have an exemption for federal judges who assume senior status.³³ As Rule 15 states: “A senior judge may keep as much of his or her existing docket as that judge desires and furnish the assignment committee with a list of all cases which the judge desires to have transferred.”³⁴

In 1996, Judge Keenan earned senior status.³⁵ Even if the latest rules were in effect then, he would have been exempt. The initial MDL process that led to Judge Keenan being selected as the consolidating judge in 1985 paved the way for him to hear subsequent *non-MDL* matters on Bhopal between 2000 and 2014. Otherwise put, path dependence—or the idea that historical decisions “lock-in”³⁶ future events that may or may not be optimal for the greater good—appears to have occurred in this situation. The result was that one judge was able to shape and influence the outcomes of a series of cases for nearly thirty years. Moreover, the continued presence of the senior status exemption means that there is nothing to stop this type of situation from occurring again in the future. From a normative perspective, such a process runs deeply counter to the interests of public policy and has serious implications for how we ought to be thinking about issues connected to corporate accountability, victims’ rights, and broader notions of due process and social justice.

This Article will proceed in the following manner. Part II will analyze the Bhopal-MDL cases of 1986, 1989, 1992, and 1993. Part III will then move to examine the set of non-MDL Bhopal matters that came before Judge Keenan beginning in 2000. This discussion will also include the role that the Second Circuit played at various points when it was asked to intervene on appeal.

Part IV will address how and why all of these Bhopal matters could appear in front of the same judge over the past three decades. Furthermore, this Part asks whether the “funneling” of cases into one judge’s docket is a normatively positive aspect of our civil procedure system. There will be a presentation and evaluation of different points of view, including a strong critique of the oft-given argument that the current process provides litigants with an “expert adjudicator” who is

32. See Macfarlane, *supra* note 24, at 215–25.

33. *Id.* at 246.

34. See S.D.N.Y. L.R. 15; see also E.D.N.Y. L.R. 15; Macfarlane, *supra* note 24, at 246.

35. See Keenan, *John Fontaine*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/keenan-john-fontaine> (last visited Feb. 15, 2020).

36. See Brian W. Arthur, *Competing Technologies, Increasing Returns, and Lock-in by Historical Events*, 99 ECON. J. 116, 117 (1989).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 713

specialized, greatly knowledgeable, and judicially efficient. Upon surmising that the status quo, in fact, does a disservice to victims such as those from the Bhopal disaster, this Article will then move to Part V, the Conclusion. Recognizing that judicial economy advocates will remain interested in having cases continue to move expeditiously through the federal courts, there is nevertheless a call to return to a more randomized selection of judges in situations like these, so that plaintiffs seeking justice can better have their voices heard.³⁷

II. THE FIRST MAJOR BHOPAL CASE AND ITS MDL PROGENY

A. *The 1986 Forum Non Conveniens Decision*

1. Battle of the Experts

As stated above, in 1985 the JPML channeled the array of cases that had been filed by the Bhopal plaintiffs' lawyers into Judge Keenan's docket as a single consolidated matter.³⁸ During that year and the early part of 1986, the Indian government and Union Carbide wrestled over whether the case ought to be heard in the United States or India. The manner in which the parties' interests aligned were unusual, to say the least. On the one side, lawyers from Minneapolis, New York, and Cincinnati represented the Indian government.³⁹ They argued that the U.S. courts were the proper forum for adjudication because Union Carbide was headquartered and incorporated in United States and top executives resided within the country.⁴⁰ On the other side, the law firm of Kelley Drye & Warren represented Union Carbide, which contended that the dispute was best resolved within India because that is where the gas spill had occurred.⁴¹

Judge Keenan clearly understood the gravity of the matter, as indicated by his sobering opening sentence, which reiterated that "[o]n the night of December 2–3, 1984 the most tragic industrial disaster in

37. In making this argument, this Part will draw particularly upon Macfarlane, *supra* note 24.

38. For the case history on this point, see *Bano Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 583 (2d Cir. 1993).

39. See *In re Union Carbide Corp. Bhopal Gas Plant Disaster*, 634 F. Supp. 842, 843 (S.D.N.Y. 1986) (noting that the firms were Robins, Zelle, Larson & Kaplan (Minneapolis), Barrett, Smith, Schapiro, Simon & Armstrong (New York), and Waite, Schneider, Bayless & Chesley Co. (Cincinnati); Hoffinger, Friedland, Dorbish, Bernfeld & Hasen (New York) served as liaison counsel).

40. *Id.* at 855.

41. *Id.* at 861. Note that the Christie Institute of Washington D.C. served as of counsel for an amicus curiae. *Id.* at 843.

history occurred in the city of Bhopal, state of Madhya Pradesh, Union of India.”⁴² His opinion was twenty-six pages and assessed the different arguments presented by each side. Before evaluating these issues, however, Judge Keenan did not hesitate to express his dismay at the behavior of various members of the American bar who had “travelled the 8,200 miles to Bhopal in those months” after the gas leak to sign up Indian plaintiffs that “did little to better the American image in the Third World—or anywhere else.”⁴³ Although he hastened to note that none of the plaintiffs’ lawyers in this particular case were involved in such actions, Judge Keenan’s affirmative inclusion of this point, right on page one, footnote one, could be interpreted as setting the stage of what was to come within the substance of the judgment.

The main issue that Union Carbide sought to have adjudicated centered on its argument that the courts in India were the more appropriate and convenient forums to hear this case.⁴⁴ Union Carbide cited the U.S. Supreme Court’s *Piper Aircraft Company v. Reynolds* judgment for support, which Judge Keenan agreed was directly on point.⁴⁵ According to the plaintiffs, there were more applicable lower court cases, but Judge Keenan held that *Piper Aircraft*, as well as a preceding Supreme Court ruling in *Gulf Oil Corporation v. Gilbert*, were the “touchstones” for deciding this case.⁴⁶ As *Piper Aircraft* set forth, in order for a district court to rule in favor of a forum non conveniens petition, it had to determine whether the alternate venue was “adequate” and whether, upon balancing “relevant public and private interest factors,” justice would be served.⁴⁷ Additionally, Judge Keenan, in referencing *Piper Aircraft*, noted that it mattered greatly if the plaintiffs were from the United States or abroad because, if it was the former, there would be greater deference given to where the plaintiffs wished to litigate compared to if they were foreign.⁴⁸

42. *Id.* at 844.

43. *Id.* at 844 n.1. Note, this observation of Judge Keenan’s remark was made years back in Marc Galanter, *The Transnational Traffic in Legal Remedies*, in *LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL* 133–57, 147 (Sheila Jasanoff ed., 1994) (referring to this event as “the great ambulance chase”); Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 *GA. J. INT’L. & COMP. L.* 31, 72–73 (2000); Patrick M. Hanlon & Matthew M. Hoffman, *Availability of U.S. Courts for Asbestos Actions Arising out of Non-U.S. Exposures*, SG057 *ALI-ABA* 33, at 41–42 (2001).

44. *See In re Union Carbide Corp.*, 634 F. Supp. at 845.

45. *Id.* (citing 454 U.S. 235 (1981)).

46. *Id.* (citing 330 U.S. 501 (1947)).

47. *Id.*

48. *Id.*

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 715

In reviewing these elements, Judge Keenan started with the question of whether the Indian courts would be equipped to handle this case.⁴⁹ For the plaintiffs, the answer was a resounding no. India's tort law system was underdeveloped, its judiciary was severely backlogged and slow to deliver remedies, and litigants had tremendous difficulty accessing legal services.⁵⁰ Furthermore, within the courts themselves, there existed onerous bureaucratic hurdles that inhibited claimants from wanting to bring their cases in the first place.⁵¹ Professor Marc Galanter, from the University of Wisconsin-Madison, who has long been one of the world's leading scholars on Indian law, was hired as an expert witness to support these arguments made by the plaintiffs.⁵²

In his 221-page affidavit, Professor Galanter did not hold back on his views that it would be a denial of justice if the case were transferred from the SDNY to India.⁵³ For Professor Galanter, the history of British colonialism in India had resulted in a mismatch whereby a foreign power had placed onto its colony a legal system that did not meet the needs of its citizens.⁵⁴ Inordinate delay, a lack of familiarity with complex tort cases by judges, and a legal profession that had insufficient resources, expertise, and background on litigating tort matters all were enormous obstacles for the Bhopal plaintiffs.⁵⁵ Add to these obstacles that the Indian courts simply did not have the necessary infrastructure, technology, and investigative tools that were crucial to hearing such a massive, complicated case.⁵⁶

49. *Id.* at 847.

50. *Id.* at 847–48.

51. *See id.* at 847.

52. *Id.* For background on Professor Galanter, see *Marc Galanter*, U. WIS.-MADISON, <https://secure.law.wisc.edu/profiles/msgalant@wisc.edu> (last visited Feb. 16, 2020). *See also About Professor Marc Galanter's Involvement in Bhopal*, U. WIS. L. SCH. DIGITAL REPOSITORY, <https://repository.law.wisc.edu/s/uwlaw/page/about-marc-galanter> (last visited Jan. 29, 2020). For a discussion of Professor Galanter's role in this case, see Sheila Jasanoff, *Bhopal's Trials of Knowledge and Ignorance*, 42 *NEW ENG. L. REV.* 101, 105 (2008).

53. *See* Affidavit of Marc S. Galanter at 199, *In re Union Carbide Corp. Bhopal Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986) (No. 626). For a series of more recent works confirming that the court system in India suffers from numerous issues that result in a denial of justice to everyday litigants, see Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 *HASTINGS L.J.* 789, 789–91 (2004); Jayanth K. Krishnan et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 *HARV. HUM. RTS. J.* 151, 152–54 (2014); Jayanth K. Krishnan & Patrick W. Thomas, *Surveying Key Aspects of Socio-Legal Scholarship on India: An Overview*, 11 *ANN. REV. L. & SOC. SCI.* 337, 352 (2015).

54. *See* Affidavit of Marc S. Galanter, *supra* note 53, at 169–70.

55. *Id.* at 172–79.

56. *Id.* at 183–85.

Finally, according to Professor Galanter, the procedural rules in India were archaic and unfairly disadvantaged parties such as the Bhopal victims. Indian law, for example, did not provide for class action suits for toxic tort cases.⁵⁷ Discovery was also notably restricted.⁵⁸ Moreover, defendants could easily employ stalling tactics, such as filing large numbers of interlocutory appeals.⁵⁹ And plaintiffs were precluded from impleading third-party defendants into civil suits.⁶⁰

It is important to note that Professor Galanter's affidavit was based not just on his years of experience in India, but also, quite significantly, on the work of *Indian* lawyers and scholars whom he repeatedly cited.⁶¹ Nevertheless, Judge Keenan opted to disregard his analysis, noting that Professor Galanter's "opinions concerning the Indian legal system, its judiciary and the bar are far less persuasive"⁶² because he was never "admitted to practice in India."⁶³ Instead, Judge Keenan pointed to two experts that Union Carbide had hired—N.A. Palkhivala and J.B. Dadachanji, "each of whom had been admitted to practice in India for over 40 years" and "[b]oth [of whom] are Senior Advocates before the Supreme Court of India."⁶⁴ Palkhivala and Dadachanji argued that India could indeed handle this type of litigation and that its courts were prepared and that Indian judges were ready to deliver justice in a timely and innovative fashion.⁶⁵ There were other cases that, while not as big, showed the Indian judiciary to be acting prudently, fairly, and quickly.⁶⁶

Moreover, Palkhivala and Dadachanji rejected the idea that the Indian courts lacked the necessary infrastructure or technological capacity or that there were insufficient numbers of legal professionals to assist those in need. After all, given that the Indian government had stepped in, the entire power of the state now was behind the victims, which meant that all conceivable resources and talent could be

57. *Id.* at 192–93.

58. *Id.* at 187–89.

59. *Id.* at 173–75.

60. *Id.* at 195.

61. *Id.* at 170, 172, 175, 180, 201 (noting references to works by Professor Upendra Baxi and Professor M.P. Jain); *see, e.g.*, UPENDRA BAXI, THE CRISIS OF THE INDIAN LEGAL SYSTEM (1982); M.P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY (4th ed., 1981); Upendra Baxi & Marc Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, in 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES 341–86 (Mauro Cappelletti & Bryant Garth eds., 1979).

62. *In re Union Carbide Corp. Bhopal Gas Plant Disaster*, 634 F. Supp. 842, 847 (S.D.N.Y. 1986).

63. *Id.*

64. *Id.*

65. *Id.* at 848–49.

66. *Id.* at 848–50.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 717

marshalled on their behalf.⁶⁷ Additionally, Palkhivala and Dadachanji denied that Indian tort law was as incomplete and nascent as Professor Galanter had argued. They stated that it was more codified than found in Indian common law and that, because of the high rates of tort-based settlements that occurred within the country, there were simply fewer official judgments issued by the Indian courts.⁶⁸ And then procedurally, they rebutted the notion that third parties could not be impleaded; that was simply wrong, they asserted, as indicated by Rule 10(2) and section 151 of the Indian Code of Civil Procedure.⁶⁹

Upon reviewing these testimonials, Judge Keenan found Union Carbide's experts to be more convincing than the plaintiffs' experts. He concluded that the Indian courts could adjudicate the Bhopal gas leak dispute in an adequate fashion, per the standard set forth in *Piper Aircraft* and *Gilbert*. His analysis did not end there, however, as this discussion next explains.

2. Judge Keenan's Evaluation of the Evidence

The second part of Judge Keenan's opinion dealt with another crucial issue raised in both *Gilbert* and *Piper Aircraft*—namely, ensuring that the “private interests”⁷⁰ of the competing parties would be safeguarded. Specifically, what this meant, according to the judge, was that he was obliged to determine whether the American courts or the Indian courts would be the best venue to evaluate the different pieces of evidence that each side would likely proffer in order to make their case. Judge Keenan began this task by addressing Union Carbide's argument that “virtually all of the evidence [that] will be relevant at trial in this case . . . [was]

67. *Id.* at 849.

68. *Id.*

69. *Id.* at 850 (noting that Rule 10(2) “allows the court to add additional parties if the presence of those parties is ‘necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit’”). Dadachanji's affidavit also notes that section 151 would allow for impleading third parties in the interests of justice. *Id.* at 850–51. Two additional rebuttal points that Union Carbide's experts made were in regards to Professor Galanter's concerns over not having juries to decide this case and not having a legal professional who worked under a contingency fee model, which Professor Galanter believed, respectively, would likely hurt the chances of the victims being able to redress their grievances fully (and being compensated accordingly) and deprive them of access to lawyers who might want to help but who could not because of the prohibition on contingency fees. *Id.* at 851. Union Carbide's experts flatly rejected these arguments, noting first that civil law countries do not have juries (nor does Britain) for civil cases, and tort disputes are adjudicated perfectly well in these contexts. *Id.* Second, the experts noted that contingency fees are primarily an American phenomenon and that lawyers in other jurisdictions do just fine in serving tort-based clients with their claims. *Id.* at 851–52.

70. *Id.* at 852.

located in India.”⁷¹ For example, plant records, plant personnel, and the plant itself—which had seven separate facilities—were all there.⁷² Moreover, Union Carbide’s position was that its Indian subsidiary employees were the individuals that needed to be interviewed, investigated, and potentially held to account—not the U.S. parent company or its American employees.⁷³ The reason was simple: “[T]he Bhopal plant was managed and operated entirely by Indian nationals, who were employed by [Union Carbide India Limited (“UCIL”).”⁷⁴

For the plaintiffs, the linkages between the parent company and UCIL were intertwined, so much so that it made only logical sense for the evidence to be evaluated by U.S. courts. Consider that safety inspections on the Bhopal plant had been done by American Union Carbide supervisors. Because there had been two earlier plant accidents, the plaintiffs believed they deserved an opportunity—in an American court—to show how there was a connection between the parent corporation and the subsidiary.⁷⁵

It was also crucial that the plaintiffs be able to depose and cross-examine these officials under American rules of evidence. Additionally, the plaintiffs argued that they could show that the design of the Bhopal facility was directly tied to plans set forth by Union Carbide’s American technicians.⁷⁶ And the plaintiffs rejected the idea that an effective trial could not take place in the United States just because the plant was located in India.⁷⁷ In most major toxic tort and product liability cases, they contended, “videotapes, pictures, diagrams, schematics and models are [known to be] more instructive than actual view.”⁷⁸

In determining the issue of how best to balance the private interests of both sides, Judge Keenan ultimately came down in favor of Union Carbide. He provided several reasons why he felt this was the most just outcome. Given that the victims and virtually all the evidence were located in India, the transportation of these individuals and other “sources of proof” to the United States made little sense.⁷⁹ Conversely, asking the handful of Union Carbide officials from the United States to travel to India to testify, if needed, would be both easier and cheaper.⁸⁰

71. *Id.* at 853–54.

72. *Id.* at 852.

73. *Id.*

74. *Id.*

75. *Id.* at 854–56.

76. *Id.* at 855.

77. *Id.* at 860.

78. *Id.*

79. *Id.* at 853.

80. *Id.* at 859.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 719

Relatedly, and critically, because the Indian government had taken over as the representative of the plaintiffs' interests, it only made sense for the case to be in India, since these public officials were located in the country. As Judge Keenan held, there was a fairness and due process component to this analysis as well; were the case to be held in the United States, then many of these witnesses and pieces of evidence likely would not make it out of India, thereby depriving the defense from evaluating and adequately confronting their accusers.⁸¹

In addition to these "private interest concerns," Judge Keenan also addressed a set of "public interest" factors that needed to be taken into account, per the Supreme Court's *Gilbert* ruling.⁸² For example, he raised the issue of how hearing the case in the SDNY would cause enormous logistical burdens on the court's resources, staff, and infrastructure. Finding jurors would also be difficult, and there would be the constant hassle and worry of ensuring proper translation from the Indian language of Hindi to English, whenever witnesses so needed it.⁸³ Then there were the financial costs that would be imposed on American taxpayers.⁸⁴ While precise dollar amounts could not be estimated, Judge Keenan projected that the expenses of hosting the litigation in New York would be disproportionately higher than if the case were heard in India.⁸⁵

And finally, Judge Keenan concluded upon a simple point—the appropriate law to apply was Indian law.⁸⁶ The accident occurred in India; the number of "contacts" who were affected by the disaster were far more in India than in the United States; India's stake in this case was paramount; and, as such, an Indian court was most suitably equipped to handle and apply Indian law to the case itself.⁸⁷ Because of his belief that the Indian legal system could handle this litigation in an appropriate fashion and that justice would be upended if he were to hold otherwise, he stated that "[i]t would be sadly paternalistic, if not misguided," for the case to proceed in the United States.⁸⁸

Therefore, in sum, Judge Keenan dismissed the plaintiff's case on forum non conveniens grounds. As part of his order, the judge required that Union Carbide waive any statute of limitations defense it might

81. *Id.* ("While Union Carbide might be deprived of testimony of witnesses or even potential third-parties if this action were to proceed in this [U.S.] forum, no such problem would exist if the litigation went forward in India.")

82. *Id.* at 852, 860.

83. *Id.* at 862.

84. *Id.* at 867.

85. *Id.* at 862.

86. *Id.* at 866.

87. *Id.*

88. *Id.* at 864.

make, as well as agree to abide by any judgment reached by an Indian court.⁸⁹ Interestingly, there was one other condition to which the company had to adhere. The last sentence of the opinion ended by mandating that “Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.”⁹⁰

In the following years, subsequent cases that fell under the MDL umbrella came in front of Judge Keenan. The next Section evaluates his rulings in each of these.

B. *The Remaining MDL Cases*

On February 14, 1989, an agreement was reached between the Government of India and Union Carbide stating that the latter would pay \$470 million to settle all outstanding claims being made by the plaintiffs.⁹¹ The Supreme Court of India gave its approval to this settlement. The money was to be paid to the Indian government, which in turn would disburse the sums to the victims of the Bhopal disaster.⁹²

This settlement was related to the just-discussed, initial MDL. Thereafter, three of the American lawyers representing the victims and the Indian government—F. Lee Bailey, Stanley Chesley, and Lionel Marks—sought to recoup their fees from the settlement that had been brokered.⁹³ They approached Judge Keenan in 1989 in hopes that a portion would be set aside to cover the costs they had incurred.⁹⁴

89. *Id.* at 867.

90. *Id.* Although she does not discuss Bhopal/Union Carbide or this decision by Judge Keenan, see generally Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 395–98 (2017) (noting the ills that have arisen as a result of judges employing this doctrine).

91. For a discussion of this point, see *A Bhopal Timeline*, UNIV. WIS. L. SCH. DIG. REPOSITORY, <https://repository.law.wisc.edu/s/uwlaw/page/a-bhopal-timeline> (last visited Feb. 17, 2020). See also *N.Y. Federal Court Dismisses Bhopal Suit, Finds Union Carbide Met Obligations*, 10 ANDREWS CLASS ACTION LITIG. REP. 13 (2003); Mary Elliott Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 168 (2003). For an interesting discussion of what transpired at the lower level court in Bhopal and then on appeal in the Madhya Pradesh High Court, after Judge Keenan's 1986 dismissal, see Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 684–87 (1990).

92. *A Bhopal Timeline*, *supra* note 91; *N.Y. Federal Court Dismisses Bhopal Suit, Finds Union Carbide Met Obligations*, *supra* note 91; Rolle, *supra* note 91; Wasserman, *supra* note 91.

93. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, No. 21-38 (JFK), 1989 WL 66673, at *1 (S.D.N.Y. June 14, 1989).

94. *Id.* at 1.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 721

Unlike in his 1986 ruling where he skeptically viewed the motives of many of the American lawyers who traveled to Bhopal, Judge Keenan praised the ethics and values of Bailey, Chesley, and Marks in this 1989 case.⁹⁵ However, he ruled that his earlier judgment, which was upheld by the Second Circuit, precluded the lawyers from seeking relief in U.S. courts.⁹⁶ If these lawyers wanted to pursue their claims for fee-reimbursement, they had to do so within the Indian judiciary. As such, the case was dismissed.⁹⁷

In 1992, another MDL matter was brought to Judge Keenan. This case originally was filed in Texas by lawyers for a class of plaintiffs who wanted their claims heard in state court.⁹⁸ The lawyers argued that since Union Carbide had begun its chemical production operations in Texas as early as 1941, and continued to maintain a presence there, the state courts had jurisdiction to hear the case.⁹⁹ Union Carbide, however, was able to remove the litigation to a federal court within Texas. From there, the U.S. Judicial Panel on Multidistrict Litigation intervened, much to the objection of the plaintiffs' lawyers, and subsequently assigned the case to the federal district court of the SDNY, with Judge Keenan presiding.¹⁰⁰

The plaintiffs were keen on litigating this case in the Texas state courts because of their belief that, under Texas law, the defendants would have a more difficult time prevailing on a *forum non conveniens* motion.¹⁰¹ Without much explanation, other than noting that this was a "diversity action" that required him to "apply federal *forum non conveniens* law to the issue of the convenience of this forum," Judge Keenan brushed aside this argument.¹⁰²

The plaintiffs then put forth a theory stating that even under his own 1986 ruling, Judge Keenan had to allow them to move forward with this case. After six years of trying to pursue their claims in India, the plaintiffs stated that the judiciary there was not properly handling the complexities of the matters before it. The alternative forum was not

95. *Id.* at 2 ("At each stage of the litigation in the United States they demonstrated professionalism and a genuine concern for the victims and their families. Their conduct insured that those who suffered loss receive fair and careful representation here in the United States Courts.").

96. *Id.*

97. *Id.*

98. *See In re Union Carbide Corp. Gas Plant Disaster*, No. MDL 626, 1992 WL 36135, at *1 (S.D.N.Y. Feb. 18, 1992).

99. For a history of the Union Carbide Corporation, see *History*, UNION CARBIDE CORP., <http://www.unioncarbide.com/History>.

100. *See In re Union Carbide Corp. Gas Plant Disaster*, 1992 WL 36135, at *2.

101. *Id.* at *3.

102. *Id.*

comparable. Delay persisted with the courts, and, moreover, the \$470 million settlement that had been reached was woefully inadequate to meet the needs of the victims and, in reality, had only come about through “unfair and coercive means.”¹⁰³ Finally, as a response to the logistical burdens of trying the case in an American court, the plaintiffs’ lawyers offered to cover all of the expenses of those injured who needed to travel from India to the United States “for depositions and medical examinations.”¹⁰⁴ They were even willing to pay for the costs to depose those defendants who were located overseas.¹⁰⁵

Nevertheless, Judge Keenan refused to accept these arguments as well. Perhaps more troubling, rather than offering a substantive rebuttal, he simply referenced his 1986 opinion as the benchmark for why he would not let this case proceed. For Judge Keenan, so long as the judiciary and Parliament of India continued to believe that the plaintiffs could receive timely and adequate justice in the Indian courts, he had no reason to question this conclusion.¹⁰⁶ That he described the plaintiffs’ positions, early in his opinion, as “a thicket of arguments, some of which would be labeled imaginative by a kind or charitable observer,”¹⁰⁷ no doubt sealed the claimants’ fate as to what the outcome in this case would be.¹⁰⁸

The final MDL case that Judge Keenan heard was a year later (1993) and involved a rehearing of the attorneys’ fees matter from 1989. Following that 1989 decision, the Second Circuit took the matter up on appeal. The appellate court affirmed Judge Keenan’s decision, ruling that he had no jurisdiction to allocate any part of the \$470 million settlement towards fees for the plaintiffs’ lawyers.¹⁰⁹ The lawyers’ best chance would be to pursue their claims within the Indian judiciary.¹¹⁰

Thereafter, the plaintiffs’ lawyers asked the Indian Supreme Court to consider whether they could stake a claim from the settlement amount. They even sought to place a lien on that portion that would equal the

103. *Id.* at *4.

104. *Id.* at *4.

105. *Id.*

106. *Id.*

107. *Id.* at *3.

108. Note in 1993, the Second Circuit affirmed Judge Keenan’s opinion and went one step further, declaring that the plaintiffs simply had no standing because of the Indian government’s passage of the Bhopal Act, which nullified any other party, except for the Indian government, to represent the interests of those who were injured or had died. *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 585 (2d Cir. 1993).

109. *See Chesley v. Union Carbide Corp.*, 927 F.2d 60, 61–62, 68 (2d Cir. 1991).

110. *See id.* at 68.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 723

percentage they said they were owed.¹¹¹ Their request was denied by the Indian Court on the ground that it was entered too late and that it should have been proffered during the discussions that the Indian government was having with Union Carbide or as the judicial proceeding was reviewing the settlement.¹¹² As a result, the lawyers reappeared in Judge Keenan's court in 1993, seeking to pursue a claim against Union Carbide under section 475 of the New York Judiciary Law, which permitted lawyers to issue a lien on property in expectation of fee payments.¹¹³

Judge Keenan, given his earlier judgment, perhaps not surprisingly was unsympathetic. He first held that the New York law only applied to a limited set of circumstances, of which this Bhopal matter was not one.¹¹⁴ He then criticized the lawyers (whom he had praised in the 1989 case) now for being lackadaisical. They could have been timely in their filings in India—they were not.¹¹⁵ They had enlisted their clients in India by using American contingency fee agreements, but they did not do their due diligence to learn whether such arrangements were legal under Indian regulations—they were not.¹¹⁶ As a last resort, they were now seeking a “deep pocket” defendant—Union Carbide—to pay for their fees, which the corporation had no obligation to do, according to the judge.¹¹⁷ As such, he had little difficulty dismissing the case.¹¹⁸

With this last 1993 judgment, the MDL came to an end. To recap, the MDL began with the seminal 1986 forum non conveniens ruling, followed by the MDL cases in 1989, 1992, and 1993. In all of these decisions, Judge Keenan ruled against the claimants or the claimants' lawyers and in favor of Union Carbide.¹¹⁹ Starting in 2000, a series of new Bhopal-based

111. *In re Union Carbide Corp. Gas Plant Disaster*, No. M21-38 (JFK), 1993 WL 541230, at *3 (S.D.N.Y. Dec. 28, 1993).

112. *Id.*

113. *Id.* According to Judge Keenan, in going only against Union Carbide, the lawyers were “heeding the *Chesley* court’s observation that any claims against UOI would likely be precluded by considerations of comity and sovereign immunity.” *Id.* (citing *Chesley*, 927 F.2d at 67 n.4). The New York law still allows for this petition today. See N.Y. JUD. § 475 (McKinney 2019).

114. *In re Union Carbide Corp. Gas Plant Disaster*, 1993 WL 541230, at *3–4.

115. *Id.* at *4.

116. *Id.*

117. *Id.*

118. *Id.* at *5.

119. It should be noted that after the 1986 decision, the Second Circuit reviewed Judge Keenan’s opinion and affirmed—but also “modified”—it as well. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 205–06 (2d Cir. 1987). The appellate court held that Judge Keenan’s rulings that Union Carbide be required to “consent to the enforcement of a final Indian judgment,” as well as obliging the company to adhere to American discovery rules while litigating this case in India, were both in error. *Id.* at 205.

judgments—that were not MDL-related—emerged from Judge Keenan’s court. The next Part examines these rulings and the influence that the earlier cases had on these later outcomes.

III. THE NON-MDL, BHOPAL-RELATED CASES

Starting in 2000, the federal courts—namely, Judge Keenan’s court and, on occasion, the Second Circuit—issued a combined sixteen rulings that related to the Union Carbide disaster in Bhopal. These rulings involved two main cases, *Sajida Bano et al. v. Union Carbide and Warren Anderson*¹²⁰ that went from 2000–05 and *Janki Sahu et al. v. Union Carbide and Warren Anderson*, which lasted from 2005–13.¹²¹ As explained below, neither of these cases were MDL matters and thus, in theory, the plaintiffs’ claims should have stood or fallen on their own, independent merits.

A. *The Sajida Bano Case*

In 2000, Judge Keenan heard a case involving a group of “survivors and next-of-kin of victims of the Bhopal Gas Plant disaster of December 2–3, 1984.”¹²² It is important to note the history: the plaintiffs were part of the class that brought their set of complaints to Judge Keenan back in 1992. Recall that case was part of the MDL, which was dismissed. Seven years then passed and, as Judge Keenan described, a reconstituted group of claimants filed a new case with new legal claims in a single district against Union Carbide and its Chief Executive Officer, Warren Anderson.¹²³

Thus, the 2000 *Sajida Bano* case was not part of the MDL from the 1990s. Nevertheless, it was on Judge Keenan’s docket, and he presided over the matter for the next five years as it went through an appeal and then remand, followed by another appeal and then a second remand. The essence of the case was straightforward. *Sajida Bano*, together with a

The Second Circuit’s decision, thus, gave Union Carbide an even bigger win than Judge Keenan’s original decision. For a further discussion, see Rolle, *supra* note 91, at 164–65.

120. No. 99 Civ. 11329 (JFK), 2000 WL 1225789, at *1 (S.D.N.Y. Aug. 28, 2000), *aff’d in part, vacated in part* Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001).

121. 418 F. Supp. 2d 407 (S.D.N.Y. 2005). Note, as will be discussed, there were subsequent related cases that came to be known as *Sahu II* and *Sahu III*. See *infra* Section III.B. Also, Judge Keenan’s ruling in 2012 was his last one on this case, and it was affirmed by the Second Circuit in 2013. See *Sahu v. Union Carbide Corp.*, 528 F. App’x 96 (2d Cir. 2013).

122. See *Bano*, 2000 WL 1225789, at *1.

123. *Id.* at *5. Note, some members from the original 1992 case did participate in this later case.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 725

class of other plaintiffs, sought to bring multiple causes of action against Union Carbide and its then-CEO Anderson under the Alien Tort Claims Act (“ATCA”).¹²⁴ The thrust of the ATCA grievances revolved around the plaintiffs’ assertions that the company and Anderson had committed egregious human rights violations in how they operated the facility, which caused injury, death, and destruction to the thousands of victims in Bhopal.¹²⁵ In addition, they brought a series of nuisance, environmental degradation, fraud, and property complaints as part of their petition.¹²⁶

In a sharp rebuke to the plaintiffs, Judge Keenan granted the defendants’ motions to dismiss for failing to state a claim as well as summary judgment.¹²⁷ According to Judge Keenan, the plaintiffs had no standing to sue. The Indian Parliament’s passage of the Bhopal Act necessarily precluded Sajida Bano and the others from proceeding with this suit.¹²⁸ Judge Keenan pointed to the Indian Supreme Court’s 1990 decision, *Charan Lal Sahu v. Union of India*, upholding the constitutionality of the statute, as support for the finding that only “the Indian Government had exclusive authority to represent the victims.”¹²⁹ Given the outcome of *Lal Sahu*, Judge Keenan then proceeded to hold that the Indian government had the sole and absolute power to negotiate a civil settlement with Union Carbide for the \$470 million that was reached.¹³⁰ As Judge Keenan stated, because the various ATCA causes of action being pursued here were civil in nature, and thus fell under the umbrella of the settlement, the current plaintiffs were collaterally estopped from moving forward with their case.¹³¹

124. *Id.* The specifics of the claims were listed by Judge Keenan as follows: “(1) Violations of international criminal law under the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350; (2) Racial discrimination in violation of international law under the ATCA, 28 U.S.C. § 1350; (3) Cruel, inhuman, and degrading treatment under the ATCA, 28 U.S.C. § 1350; (4) Violation of the rights to li[f]e, health, and security of the person under the ATCA, 28 U.S.C. § 1350; (5) Violations of international environmental rights under the ATCA, 28 U.S.C. § 1350; (6) A consistent pattern of gross violations of human rights under the ATCA, 28 U.S.C. § 1350.”

125. *See id.*

126. *Id.*

127. *Id.* at *15.

128. *Id.* at *10–12.

129. *Id.* at *3 (citing (1990) 1989 SC 639 (India)).

130. *Id.* at *12.

131. *Id.* at *13. Note that as part of their case, the plaintiffs had argued that Union Carbide’s criminal activity, which had been investigated by the Indian Government, provided them with an avenue to pursue—separately—their various civil claims and their ATCA causes of action within the American federal courts. *Id.* The plaintiffs also argued that the “Defendants’ motions [to dismiss and for summary judgment should be ignored by Judge Keenan] on the basis of the ‘fugitive disentitlement doctrine.’” *Id.* at *6. Essentially,

One year later, the Second Circuit heard this case on appeal.¹³² It affirmed Judge Keenan's central holdings, save one.¹³³ At the district court level, the plaintiffs had argued that they ought to be able to sue the defendants on a number of common law environmental violations that were not tied to the 1984 disaster.¹³⁴ According to the Second Circuit, Judge Keenan too summarily dismissed this complaint without providing adequate explanation and, as such, remanded on this point.¹³⁵ However, as the court stated, "We are nonetheless confident, particularly in light of Judge Keenan's extensive and intimate familiarity with the Bhopal disaster litigation, that we would benefit from his consideration of these issues in the first instance."¹³⁶

Subsequently, on remand, Judge Keenan wrote a detailed opinion of whether the plaintiffs had a claim on this front.¹³⁷ This time around, the plaintiffs also made an additional request. Knowing that Judge Keenan believed that Indian law ought to govern this dispute, they asked that the laws of their home jurisdiction be used by Judge Keenan, *in his court*, to decide this matter, for which there was precedent.¹³⁸ As their amended complaint argued, while Indian law was satisfactory on paper, Indian courts simply did not execute well enough on providing adequate remedies—like the American federal courts historically had.¹³⁹

what the plaintiffs were saying was that because there were criminal investigations pending against Union Carbide in India, which needed to be resolved completely, the company ought to be prevented from moving to dismiss the claims being brought by the plaintiffs in the United States. *See id.* at *7. The court, however, disagreed and said that the only case it could concern itself with was the civil, tort-based case. *See id.* The fact that there may or may not be a criminal case against Union Carbide (in a foreign jurisdiction, no less) was immaterial for the case at bar (Union Carbide and Warren Anderson refused to consent or acknowledge that they could be subject to criminal prosecution in India). *Id.* at *8. As the primary support for its holding, the court cited *Degen v. United States*. *Id.* at *6–8 (citing 517 U.S. 820 (1996)). For a critical evaluation of *Bano v. Union Carbide*, including a rebuke from one of the plaintiffs' lawyers (H. Rajan Sharma) who critiqued the Indian Government's failure to represent the victims in a zealous fashion, see C. Raj Kumar & Pratibha Jain, *Last Chance to Render Justice to Bhopal Victims*, HINDU (Dec. 13, 2000), <https://www.thehindu.com/thehindu/2000/12/13/stories/05131349.htm>.

132. *Bano v. Union Carbide Corp.*, 273 F.3d 120, 120 (2d Cir. 2001).

133. *Id.* at 122.

134. *Id.*

135. *Id.*

136. *Id.* at 133. For a contemporaneous piece that was written with optimism that the Second Circuit's ruling would bring about much-needed justice for the victims, see C. Raj Kumar, *Bhopal Victims' Legal Victory*, HINDU (Dec. 11, 2001), <https://www.thehindu.com/thehindu/op/2001/12/11/stories/2001121100040100.htm>.

137. *Bano v. Union Carbide Corp.*, No. 99 Civ.11329 JFK, 2003 WL 1344884, at *3–9 (S.D.N.Y. Mar. 18, 2003).

138. *Id.* at *3.

139. *Id.*

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 727

Judge Keenan was not impressed by either the original or new claim. He saw the latter change in course to be purely instrumental. New York law, which otherwise could have applied to sue on a harm that occurred outside the United States, had a statute of limitations that had lapsed, he held.¹⁴⁰ To argue that Indian law now needed to be employed by an American court was simply an end run. Furthermore, he was unwilling to forget that the plaintiffs' original complaint had bemoaned Indian law as being insufficient and that these types of inconsistent "pleading defects cannot be tolerated . . . in such lengthy and extensive litigation."¹⁴¹ Consequently, he dismissed the case for lack of timeliness, as well as reaffirmed his previous decision on the environmental claims for why this case could not continue.¹⁴²

Once again, the plaintiffs asked the Second Circuit to review the case.¹⁴³ And again, the appellate court sent the matter back to Judge Keenan.¹⁴⁴ In their appeal, the plaintiffs argued that Judge Keenan's statute of limitations interpretation of the New York law was too sweeping and did not distinguish between their property damage and personal injury claims against the defendants.¹⁴⁵ The Second Circuit agreed and asked Judge Keenan to consider whether the plaintiffs could proceed, in particular, with the property damage claim as a class action.¹⁴⁶

Judge Keenan, upon a rehearing, refused to grant class certification. Under Rule 23 of the Federal Rules of Civil Procedure, he found that the

140. *Id.* at *4–6.

141. *Id.* at *3.

142. *Id.* at *9. These reaffirmed principles included the following: first, one of the main plaintiffs, Haseena Bi, argued that because her injuries were patent, the New York law provided an exemption to its firm statute of limitations. *Id.* at *4. The court held otherwise. *Id.* at *5. In addition, she and the others sought to recover for property damage that they attributed to Union Carbide's actions. *Id.* at *6. There too, the court rejected this complaint as "nonsensical." *Id.* The plaintiffs also contended that Union Carbide and Anderson engaged in fraud and deception in covering up their actions, which resulted in the plaintiffs' injuries (both personal and property). *Id.* The court found no evidence of such behavior and, in fact, went further to hold that Union Carbide had built an adequate hospital and had "met its obligations to clean up the contamination in and near the Bhopal plant." *Id.* at *9. And finally, the court continued to state that the plaintiffs lacked standing and that the proper venue to litigate all of these types of matters should be in India and not in the United States. *Id.* at *8.

143. *See* *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004).

144. *Id.* at 717.

145. *Id.* at 706.

146. *Id.* at 702, 713. The appellate court also appeared persuaded by third party reports indicating that Bi's discovery of the property damage occurred later in time, which, if true, would have allowed her to bring forth her claim within New York's statutory period, thus vitiating the argument that she had not been timely in filing this cause of action against Union Carbide and Anderson. *Id.* at 712–13.

plaintiffs did not have the financial wherewithal to proceed as a class.¹⁴⁷ Moreover, the property claim was based on the damage caused to an *aquifer* that was affecting the entire Bhopal community, rather than to individually owned personal property, which, according to the judge, negated the right to proceed. Finally, he refused to reverse his earlier dismissal, noting that he could not “allow [the p]laintiffs to intervene in or to certify a class for a claim that was [already properly] dismissed.”¹⁴⁸

This last ruling put a final end to the *Sajida Bano* case. The Second Circuit did not contest Judge Keenan’s decision and the matter was closed. These plaintiffs encountered a similar fate to the earlier litigants of the 1980s and 1990s. Even though this case was supposed to have been evaluated independently on its own merits, Judge Keenan’s reasons for repeatedly granting the defendants’ various motions to dismiss were clearly tied to the MDL. Over the ensuing decade, a similar trend emerged in a subsequent case.

B. *The Sahu Case(s)*

Beginning in 2005, a second group of plaintiffs, led by a victim of the disaster, Janki Bai Sahu, brought a series of new claims against Union Carbide and Warren Anderson.¹⁴⁹ This class of petitioners sought to show that the parent company could be held liable in the United States for the tortious actions of its Indian subsidiary.¹⁵⁰ Specifically, the plaintiffs complained that there had not been sufficient medical monitoring of those who had suffered injury, nor was there adequate remediation.¹⁵¹

Judge Keenan began this discussion by bluntly stating that he “could dismiss all of [the p]laintiffs’ claims based on *forum non conveniens*.”¹⁵² The reason was simple: there were many similarities between this matter and the first Bhopal case from 1986. However, because this was a separate situation, Judge Keenan noted that it demanded an analysis of the “[p]laintiffs’ claims based on the merits.”¹⁵³ On its face, this statement might have offered hope for the claimants that they would be receiving a fresh take on their case—one unsaddled by the influences of previous rulings. Yet, such optimism was dashed almost immediately thereafter.

147. *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329 (JFK), 2005 WL 2464589, at *4 (S.D.N.Y. Oct. 5, 2005) (“Rule 23(a)(4) allows certification only if ‘the representative parties will fairly and adequately protect the interests of the class.’”).

148. *Id.* at *4.

149. *See Sahu v. Union Carbide Corp.*, 418 F. Supp. 2d 407, 409 (S.D.N.Y. 2005).

150. *Id.* at 408–09.

151. *Id.* at 409, 411.

152. *Id.* at 410.

153. *Id.*

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 729

For example, throughout the substance of his opinion, Judge Keenan repeatedly referenced his previous rulings in the *Sajida Bano* and MDL cases.¹⁵⁴ Regarding *Bano*, he pointed out that he had already decided that providing relief on the claims of medical monitoring and remediation were “infeasible.”¹⁵⁵ He further held—similar to what he decided before in the MDL matter—that the connection between Union Carbide-U.S. and Union Carbide-India was too tenuous. They did not act as “joint tortfeasors,”¹⁵⁶ nor did they act in a nefarious manner with one another to commit an intentional tort. Judge Keenan also found no evidence that there was any duplicitous behavior on the part of Anderson or any Union Carbide official to cause the accident or perpetuate the harms that had been continuing.¹⁵⁷ But as he concluded his opinion, Judge Keenan did offer one relatively modest accommodation for the plaintiffs: he granted them a stay so that they could have more time to engage in further discovery for a possible claim of corporate veil piercing.¹⁵⁸

Following this decision, the litigation took on a dizzying set of turns. The plaintiffs filed an appeal to the Second Circuit. Before a decision was made by the appellate court, though, Judge Keenan ruled on the corporate veil piercing motion in November of 2006. He issued a dismissal opinion that forcefully ended with this line: “This case is closed, and the Court directs the Clerk to remove the case from the Court’s docket.”¹⁵⁹

Yet, the case in fact was not closed. In 2008, the Second Circuit remanded the entire matter back to Judge Keenan’s court, holding that he had too summarily evaluated the evidence amassed by the plaintiffs and had not given them enough time to reply to the defendants’ motion for summary judgment.¹⁶⁰ Meanwhile, the previous year (2007), a second set of plaintiffs (some of whom were the same as the plaintiffs in the first *Sahu* case) had filed a parallel case against Union Carbide and Anderson, and added to the list the Indian state of Madhya Pradesh, which had

154. *Id.* at 411.

155. *Id.*

156. *Id.* at 412–13.

157. *Id.* at 412–15.

158. *Id.* at 415–16.

159. *See Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2006 WL 3377577, at *11 (S.D.N.Y. Nov. 20, 2006).

160. *See Sahu v. Union Carbide Corp.*, 548 F.3d 59, 67–70 (2d Cir. 2008) (“*Sahu III*”).

taken over the Bhopal facility.¹⁶¹ This case came to be known as *Sahu II*.¹⁶²

On remand regarding *Sahu I*, there were separate but related hearings that took place during 2010. Two of these matters involved the plaintiffs asking for more time for discovery and for compelling the defendants to turn-over additional documents. Judge Keenan denied both these requests.¹⁶³ In another one of the hearings, the plaintiffs boldly asked Judge Keenan to recuse himself from any further deliberations and to assign the case to a different judge.¹⁶⁴ Their position was clear: Judge Keenan was too wedded to his earlier decisions, which made it impossible for him to consider new Bhopal-based evidence in an impartial manner.¹⁶⁵ They also asserted that he had made statements in his previous rulings that demonstrated hostility to the plaintiffs' claims and that, in order to preserve the appearance of justice, it was only fair that another unbiased judge preside in matters going forward.¹⁶⁶

Unremarkably, Judge Keenan was not convinced. He rebutted each of these points with what he argued were perfectly and rationally legal reasons for his past rulings. He also noted that not once had the Second Circuit commented on his lack of fairness or impartiality. He thereafter dismissed the motion.¹⁶⁷

By 2012, the defendants (Union Carbide and Warren Anderson) sought summary judgment to dismiss the entire *Sahu I* case in their favor.¹⁶⁸ Judge Keenan agreed, holding that neither the American

161. The group, EarthRights International, has been the leading organization to bring these cases to the U.S. federal courts. The organization's website has a detailed history and timeline of its involvement in these matters. See *Sahu v. Union Carbide*, EARTHRIGHTS, <https://earthrights.org/case/sahu-v-union-carbide/#timelineff69-1a905f26-f4b6> ("In addition to EarthRights International (ERI), counsel for the plaintiffs have included Sharma & DeYoung LLP, Curtis V. Trinko, Hausfeld LLP, and Cohen Milstein Sellers & Toll PLLC. EarthRights International has worked closely with the International Campaign for Justice in Bhopal and the Bhopal Group for Information and Action to pursue justice for Bhopal communities.").

162. *Id.*; see also *Sahu v. Union Carbide Corp.*, 475 F.3d 465 (2d Cir. 2007) (per curiam) ("*Sahu II*").

163. *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2010 WL 909074, at *6 (S.D.N.Y. Mar. 15, 2010); see also *Sahu v. Union Carbide Corp.*, 746 F. Supp. 2d 609, 612 (S.D.N.Y. 2010); *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

164. See *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2010 WL 532307, at *1 (S.D.N.Y. Feb. 11, 2010).

165. *Id.* at *2.

166. *Id.* at *3–5.

167. *Id.* at *1.

168. *Sahu v. Union Carbide Corp.*, No. 04 Civ. 8825 (JFK), 2012 WL 2422757, at *1 (S.D.N.Y. June 26, 2012); see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 731

company nor its CEO were liable as tortfeasors.¹⁶⁹ They were not responsible for the environmental degradation and pollution that occurred in the aftermath of the leak and there was not enough of a nexus between Union Carbide-India and its American parent company to justify piercing the corporate veil.¹⁷⁰ Referring to the tactics of the plaintiffs' lawyers as an "expedition worthy of Vasco da Gama,"¹⁷¹ Judge Keenan granted the defendants' motion.¹⁷²

A year later, the Second Circuit affirmed this decision, bringing to a close the *Sahu I* litigation.¹⁷³ In 2014, the plaintiffs in *Sahu II* saw their hopes of recovery end as well.¹⁷⁴ On similar grounds, Judge Keenan granted summary judgment to the defendants.¹⁷⁵ After a petition to the Second Circuit was denied and the appeals process for this case was exhausted, the Bhopal jurisprudence in the federal courts was over by 2016.¹⁷⁶ The various claimants who had come before Judge Keenan in nearly thirty years of hearings had ultimately failed to prevail in having even one single complaint heard by a trier of fact. The next Part critically examines this sad reality and analyzes whether justice was served, both procedurally and substantively.

IV. HOW JUDGE KEENAN RECEIVED THE BHOPAL CASES AND THE RATIONALE OF HIS RULINGS

A. *The Process Angle*

The introductory section of this Article discussed how the federal district court in the SDNY adheres to the "related cases rule."¹⁷⁷ As Professor Macfarlane's analysis has shown, this rule gives deference to

169. See *Sahu*, 2012 WL 2422757, at *1; see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

170. See *Sahu*, 2012 WL 2422757, at *20–23; see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

171. *Sahu*, 2012 WL 2422757, at *2; see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

172. *Sahu*, 2012 WL 2422757, at *23; see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

173. *Sahu v. Union Carbide Corp.*, 528 F. App'x 96, 104 (2d Cir. 2013); see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

174. See *Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156 (JFK), 2014 WL 3765556, at *18 (S.D.N.Y. July 30, 2014); see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

175. *Sahu*, 2014 WL 3765556, at *18; see also *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161. Note, here the defendants in this case were Union Carbide and the State of Madhya Pradesh because by this time they had taken title to the Union Carbide-India facility.

176. See *Sahu v. Union Carbide*, EARTHRIGHTS, *supra* note 161.

177. See text accompanying notes 16–22.

judges who wish to hear present and future cases connected in subject matter to earlier ones that they have adjudicated.¹⁷⁸ The lessons provided by Professor Macfarlane apply here as well.¹⁷⁹ Namely, Judge Keenan had heard the first Bhopal case in 1986, and, thereafter, his colleagues on the bench were willing to defer to him on all subsequent, Bhopal-related matters for the next thirty years.

One intellectually akin antecedent for having the related cases rule in effect can be traced back to the work of Max Weber. In classic Weberian tradition, in order to arrive at truth and a normatively positive outcome in a given situation, specialization of the investigator was key.¹⁸⁰ The idea was simple: specialization resulted in the more efficient use of time and resources. Moreover, a specialist's expertise offered legitimacy for any decisions eventually rendered.¹⁸¹ For Weber, what might be described as "cool, detached rationality" needed to pervade the decision-making process, and those who had highly technical skill sets were in the best position to accomplish this objective.¹⁸²

On its face, it might seem completely reasonable that Judge Keenan would be the natural jurist to hear the thirty years of litigation on Bhopal. He had the most familiarity with the original case, as well as the subsequent MDL matters that came before him. Furthermore, Judge Keenan has been widely admired within the SDNY. As Michael Armstrong, a former Assistant U.S. Attorney recently noted, "I do not know of another judge who is as uniformly liked as he is" and that "[o]n anyone's list of the best three judges in the Southern District of New York at any time over the past 25 years, John Keenan is going to be one of

178. See Macfarlane, *supra* note 24, at 203.

179. *Id.*

180. See MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 135–36 (H.H. Gerth & C. Wright Mills eds., 2009).

181. See also *id.*

182. Note Weber contrasted this approach with what he called "Kadi justice," or informal, capricious decisions made by adjudicators who dressed up their judgments in language of "concrete ethical standards." In reality, these Kadi-type judgments "lack[ed] definitive criteria," which Weber found to be an unacceptable method of decision-making. See Susan Hekman, *The Epistemology of Moral Voice: Displacing Hegemony in Moral/Legal Discourse*, in *ENGENDERING RATIONALES* 291–93 (Nancy Tuana & Sandra Morgen eds., 2001). There have been critics of Weber on this point, who argue that he did not have a firm grasp of how Kadi justice operated in Islamic societies. See e.g., Asifa Quaraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 MICH. ST. L. REV. 339, 339 n.1; Joyce S. Sterling & Wilbert E. Moore, *Weber's Analysis of Legal Rationalization: A Critique and Constructive Modification*, 2 SOC. F. 67, 73–74 (1987). See generally LEON SHASKOLSKY SHELEFF, *SOCIAL COHESION AND LEGAL COERCION: A CRITIQUE OF WEBER, DURKHEIM, AND MARX* (1997); David Schneiderman, *Judging in Secular Times: Max Weber and the Rise of Proportionality*, 63 SUP. CT. L. REV. 557, 564–65 (2013).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 733

them.”¹⁸³ Michael Martin, a faculty member at Fordham (Judge Keenan’s alma mater) has remarked that he “is the epitome of all that a judge should be . . . [including] [h]is commitment to serving the public and his dedication to ethical principles.”¹⁸⁴ And Robert Fiske, a former U.S. Attorney of the SDNY (1976–80) and now senior counsel at Davis Polk, has stated that, regarding the Bhopal case, Judge Keenan “handled it beautifully.”¹⁸⁵

Of course, the last comment by Fiske does not mention that in reality there was not just one Bhopal matter that Judge Keenan heard. Nevertheless, given that he had acquired international recognition after that first case in 1986—along with the fact that he possessed this enormous social capital—if any judge were to have the related case rule apply, it would be Judge Keenan. His deep knowledge of the initial Bhopal case made him, in Weberian terms, a specialist who could provide rational, nuanced, and objective guidance for subsequent parties in future matters relating to the chemical disaster. Recall, the whole idea of the MDL statute was to consolidate and make more efficient, for the federal court system, similarly situated cases that spanned the different federal courts.¹⁸⁶ The judge assigned to hear these consolidated matters was charged with supervising discovery and all pre-trial motions. The judge also had the power to promote settlements—but also to dismiss the case if it was found to have no merit. Where neither occurred, the case was to be remanded to the court where the claim was originally filed.¹⁸⁷

Several scholars have studied the MDL process in great detail. Notably, in recent years, Professor Andrew Bradt has been arguably the most prominent researcher examining the operation of the MDL system and how it came into existence.¹⁸⁸ As he demonstrates, the original goal of a “small group of scholars and judges that invented MDL and

183. See Ross Galin, *Hon. John F. Keenan: U.S. District Judge for the Southern District of New York*, FED. L., June 2016, at 21 (2016), <https://news.law.fordham.edu/wp-content/uploads/2016/06/KeenanFederalLawyerProfile.pdf>.

184. *Id.*

185. See *id.* at 23; Robert B. Fiske, Jr., DAVIS POLK, davispolk.com/professionals/Robert-fiske (last visited Mar. 4, 2020). Also see another quote from U.S. Magistrate Judge Leda Wettre, who stated that “Judge Keenan is one of the most talented—yet most humble—people I know . . . All of his former clerks have tried to emulate him. None of us will ever achieve that combination of intelligence, humor, common sense, and compassion that makes him so special, but we are all better lawyers and people for having tried.” Galin, *supra* note 183, at 26.

186. See 28 U.S.C. § 1407 (2018).

187. *Id.*

188. See Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017); Andrew D. Bradt and D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017).

shepherded it to enactment” was straightforward.¹⁸⁹ These advocates engaged in “an intentional power grab” to stem what they perceived to be an oncoming wave of mass tort litigation.¹⁹⁰ This group acted strategically. They feared that parties and lawyers, and even some sympathetic individual judges, around the country would actively use mass tort litigation as a vehicle to advance social policy and, in the process, gridlock the federal courts. As a result, Professor Bradt explains that the 1968 legislation was crafted so that “[c]ontrol of these cases . . . [was] centralized in the hands of a single and active judge—specifically a judge committed to strong pretrial case management who would direct the conduct of the nationwide litigation from the bench.”¹⁹¹

Given this history, Judge Keenan, it would seem, was simply adhering to the intent of the statute’s drafters when deciding the subsequent MDL matters that occurred after the initial 1986 case. The twist in this story though is that after 1993, the different Bhopal matters that occupied Judge Keenan’s docket were not part of the MDL. Rather, they were separate. What appears to have occurred, however, is that the MDL process created a type of path dependence for all the Bhopal matters that came into the federal courts. Even though these later cases were not part of the original MDL, they were effectively treated as such. Judge Keenan was deemed the expert, and with the related cases rule in place, he received deference from his federal court colleagues that he should be the one to preside over these later matters.

It is interesting to note this connection between MDL and the related cases rule. The federal courts literature discusses these concepts in important ways. There is the aforementioned work by scholars such as Professors Bradt and Macfarlane, respectively. Regarding the MDL, in particular, others too have written on it from significant perspectives.¹⁹²

189. Bradt, *supra* note 188, at 834, 838–39 (noting that the main proponents were federal district court Judge William Becker from Missouri, Dean Phil Neal of the University of Chicago Law School, Chief Judge Alfred Murrah of the Tenth Circuit, and federal district court Judge Edwin Robinson from Illinois).

190. *Id.* at 907.

191. *Id.* at 839.

192. For other key works by Bradt in this area, see Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018); Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. ONLINE 85 (2018); Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165 (2018). As stated, the *Columbia Law Review* also has been active in publishing pieces on MDL. See *supra* note 15; see also JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE, 132–55 (2015); Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155 (2006); Bradt, *supra* note 188; Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513 (1996); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical*

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 735

By examining how the series of Bhopal cases has transpired over the years, this Article builds upon this past literature by showing that the MDL system, in fact, can also influence how distinct, separate, *non-MDL* matters are still funneled into that same judge's docket. But there are serious consequences to this reality, which should cause concern for those who have argued that judicial efficiency and judicial expertise justify eschewing the randomized selection of judges in the docket-setting process.

B. Substantive Concerns with the Rulings Themselves

1. Returning to the 1986 Forum Non Conveniens Case

Much of the first part of Judge Keenan's 1986 forum non conveniens ruling was premised on the belief that the Indian experts hired by Union Carbide had more credibility than the plaintiffs' expert, Professor Marc Galanter. However, rather than providing data, empirics, or metrics, the two experts from the Union Carbide side offered only their professional opinion based on their own experiences as Senior Advocates in India.¹⁹³

Context: A Preliminary View, 156 U. PA. L. REV. 1439, 1507 (2008); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Howard M. Erichson, *What MDL and Class Actions Have in Common*, 70 VAND. L. REV. EN BANC 29 (2017); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 886–87 (2001); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011); Judith Resnik, *From "Cases" to "Litigation,"* 54 L. & CONTEMP. PROBS. 3, 29–35 (1991); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 108–10 (2010); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1341 (2014); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 798 (2010). For a non-MDL piece that nevertheless discusses the influence that judges can have on an area of the law if they are able to have a "dominating [effect on] the development of" that law, see Margaret V. Sachs, *Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the Market*, 48 U.C. DAVIS L. REV. 1207, 1213 (2015).

193. See Aff. of N.A. Palkhivala in Supp. of Def.'s Mot. to Dismiss on Forum Non Conveniens Grounds, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (1986) (No. 21-38) (on file with author); Aff. of J.B. Dadachanji in Supp. of Def.'s Mot. to Dismiss on Forum Non Conveniens Grounds, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (1986) (No. 21-38) (on file with author). The term Senior Advocate refers to the highest level of courtroom litigator in India. It is parallel to a Queen's Council barrister in the U.K.

To be sure, their reputations within the Indian legal profession were stellar. Nanabhoy (Nani) Palkhivala (1920–2002) was a historically important lawyer in India. A constitutional expert, prominent rights activist, leading economist, and former Ambassador to the United States, Palkhivala was regarded as one of India’s best litigators in the post-independence era.¹⁹⁴ J.B. Dadachanji (1921–2007) too was an accomplished lawyer in his own right. Working both in the Indian Supreme Court and in the corporate law firm sector, Dadachanji established himself as one of India’s great business lawyers during the twentieth century.¹⁹⁵

That said, their respective declarations read as though they were personally offended that an individual they saw as an outsider would have the temerity to criticize the system in which they worked.¹⁹⁶ For example, Palkhivala viewed Professor Galanter’s assessment—that the Indian legal system had structural problems in delivering tort remedies to victims—as “slanderous” and “unredeemable” as well as “inapt,” “untenable,” and “ludicrous.”¹⁹⁷ Dadachanji, in his short statement, used the word “incorrect” eleven times in rebutting Professor Galanter’s contention.¹⁹⁸ He also proclaimed that Professor Galanter’s affidavit “libel[ed] the Indian Courts, the Indian bar and the Indian legal system” and that such skepticism about the Indian judiciary was “inappropriate and callous.”¹⁹⁹ Returning to Palkhivala, he believed that since “[t]he claimants ha[d] no less a champion than the sovereign Union Government,”²⁰⁰ the Indian judiciary would clearly make this case a

194. See Aff. of Palkhivala, *supra* note 193, at 222–23; see also M.V. KAMATH, NANI A. PALKHIVALA – A LIFE (2012); SOLI J. SORABJEE & ARVIND P. DATAR, NANI PALKHIVALA: THE COURTROOM GENIUS (2012).

195. See Aff. of Dadachanji, *supra* note 193, at 72.

196. *Id.*; see also Aff. of Palkhivala, *supra* note 193, at 223. Note, Professor Marc Galanter’s affidavit for the plaintiffs alone was over 220 pages, compared to the sworn statements of Palkhivala and Dadachanji that were, respectively, eight and thirteen pages.

197. See Aff. of Palkhivala, *supra* note 193, at 226, 228.

198. See Aff. of Dadachanji, *supra* note 193, at 76–77, 80–82, 84.

199. *Id.* at 74, 79.

200. See Aff. of Palkhivala, *supra* note 193, at 228; see also Aff. of Dadachanji, *supra* note 193, at 78–79 (“Delay is a problem only in routine cases and not in the present type of litigation. The importance of and interest in the present litigation is apparent from the fact that the Parliament has put the Government in place of the citizens by enacting The Bhopal Gas Disaster (Processing of Claims) Act, 1985. This shows that the Government itself regards the present litigation as a matter of major public interest. It has, pursuant to the Bhopal Act, acted for all claimants in the United States, and it could do so in India as well. As the sovereign, the Government has the power to remedy all of the supposed problems mentioned in the Galanter affidavit, such as the facilities and staff made available to Judges to help them in their work.”).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 737

priority, thereby quelling any worry that the matter would languish in the courts for an unreasonable period of time.

Both advocates also noted that, if need be, the government could establish “Special Tribunals” to handle this case.²⁰¹ Such a practice was routine in other high-profile cases in order to expedite claims. And they lauded the Indian courts for being creative, innovative, and able to grasp the complexities demanded by both sides. In particular, Dadachanji’s affidavit noted that the Indian judiciary had repeatedly demonstrated its sophisticated nature through its various landmark decisions.²⁰²

These declarations notwithstanding, in actuality, research has long shown that the Indian courts struggle with delay, backlog, and the enforcement of arrears.²⁰³ In addition, the idea that the government’s representation of the plaintiffs necessarily would result in a quicker completion of the case failed to recognize the reality of events. To begin, the main assets of Union Carbide were located in the United States. The Indian government would first need to obtain a favorable ruling from the Indian courts and then take that judgment to a federal court in the United States for enforcement to collect damages.²⁰⁴

201. See Aff. of Dadachanji, *supra* note 193, at 81; Aff. of Palkhivala, *supra* note 193, at 228.

202. See Aff. of Dadachanji, *supra* note 193, at 74–76. Both experts provided other sweeping statements and rhetorical anecdotes. Aff. of Palkhivala, *supra* note 193, at 224, 228 (“The Indian judiciary is wholly competent to deal with any dispute in any field of law, and has, in the 35 years of the history of our Republic, ably dealt with far more complex issues than those arising from the gas plant disaster at Bhopal. . . . The Bhopal Act [which allowed the government to represent the plaintiffs] by itself is wholly sufficient to insulate [the] Bhopal claimants from the law’s proverbial delays. There is no ‘inadequacy’ or ‘deficiency’ in the Indian legal system which cannot be set right by the Government of India within a matter of days.”); Aff. of Dadachanji, *supra* note 193, at 77 (“It is further incorrect to say that Judges do not promote settlement in India. In fact, in recent years *in my experience*, there have been more settlements promoted by Judges. . . . Undoubtedly, the sophistication of Indian System causes some delay in administration of justice. However, the delay can be and has been overcome by Courts in matters involving substantial questions which are of great public importance.” (emphasis added)).

203. For studies that have discussed this point, see Galanter & Krishnan, *supra* note 53, at 789; Krishnan & Thomas, *supra* note 53, at 340; Krishnan et al., *supra* note 53, at 179.

204. For a discussion of foreign parties seeking to use U.S. courts, see Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 WASH. & LEE L. REV. 653, 675, 693, 697 (2016) (referencing briefly the Bhopal case and the concerns of the Indian government in pursuing the case in the Indian courts); Hanlon & Hoffman, *supra* note 43, at 41; S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 70–71 (2014); Nadja Vietz, *Recognition of Foreign Judgments in U.S. Courts*, HARRIS BRICKEN (Nov. 9, 2018), <https://harrisbricken.com/blog/recognition-foreign-judgments-us-courts/>. For a piece that looks at how domestic laws try to bring about resolution in transnational disputes, see Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 820, 833 (2009). For another study looking at the influx of transnational

The problem, however, was with the structural framework of India's judicial system. Dating back to colonial times, India's civil procedure code has provided lawyers with various interlocutory appeals, which they have frequently and successfully used to delay cases from being completed.²⁰⁵ Union Carbide, with its expert Indian lawyers, would likely have employed these same tactics in order to have prevented a quick disposition of the case.

Furthermore, with respect to Palkhivala and Dadachanji's suggestion that a special or "fast-track" tribunal could be established to expedite the process, research has found that many of the ills that plague the regular court system in India often migrate to alternative forums, with the result being delays and serious questions about the quality of justice being delivered within these supposedly faster settings.²⁰⁶ Relatedly, India suffers from enormous judicial vacancies so that, frequently, overburdened judges in the regular courts are asked to sit in specialized forums, which only compounds their workload and results in delays now in two different venues.²⁰⁷ And even if an Indian court (regular or fast-track) eventually issued a favorable judgment to the plaintiffs, it would be easy to imagine Union Carbide proffering some type of lack of due process argument in the U.S. courts during the enforcement stage.²⁰⁸ There thus would be the potential for Union

cases at the U.S. Supreme Court, see Austen L. Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. OF INT'L. L. 97, 99, 122 (2019).

205. For studies that have discussed this point, see Galanter & Krishnan, *supra* note 53, at 789; Krishnan & Thomas, *supra* note 53, at 351; Krishnan et al., *supra* note 53, at 178–79.

206. See Upendra Baxi & Marc Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, in 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES 377–80 (Mauro Cappelletti & Bryant Garth eds., 1979); R. KUSHAWAHA, WORKING OF NYAYA PANCHAYATS IN INDIA 2 (1977); S.N. MATHUR, NYAYA PANCHAYATS AS INSTRUMENTS OF JUSTICE 43–77 (1997); Catherine S. Meschivitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 65 (Richard Abel ed., 1982); Galanter & Krishnan, *supra* note 53, at 789–90; Krishnan & Thomas, *supra* note 53, at 340; Krishnan et al., *supra* note 53, at 180; Gene Kassebaum, Lok Adalat: A State Sponsored Alternative to Court Litigation of Personal Injury, Other Civil and Criminal Cases in South India 5 (1989) (unpublished manuscript) (on file with author); Catherine S. Meschivitz, *Panchayat Justice: State-Sponsored Informal Courts in 19th and 20th Century India*, Disputes Processing Research Program (Inst. for Legal Studies, Working Paper 8:1, 1987).

207. See Baxi & Galanter, *supra* note 206; KUSHAWAHA, *supra* note 206; MATHUR, *supra* note 206; Kassebaum, *supra* note 206; Krishnan et al., *supra* note 53, at 180; Meschivitz, *supra* note 206.

208. In fact, a roughly analogous situation has played out with respect to the Chevron Corporation's litigation in Ecuador. See Karan Nagarkatti & Gary McWilliams, *International Tribunal Rules in Favor of Chevron in Ecuador Case*, REUTERS (Sept. 7, 2018), <https://www.reuters.com/article/us-chevron-ecuador/international-tribunal-rules-in->

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 739

Carbide to tie up litigation in *both* the Indian courts and American courts for a long period of time.²⁰⁹

And finally, there were the claims relating to India's legal profession. Palkhivala and Dadachanji vigorously argued that there was no shortage of Indian lawyers capable of handling this case. But this assertion was belied by the empirical reality that, historically, most lawyers in the country were individual litigators who worked primarily on petty civil and criminal matters, with many struggling even to eke out an existence.²¹⁰ Research done since that period illustrates that while there has been a growth in the corporate bar as well as of law firms engaging in more global transactions—especially since the liberalization of India's

favor-of-chevron-in-ecuador-case-idUSKCN1LN1WS. Between the mid-1960s and the early 1990s, the American company, Texaco, operated in Ecuador. *Id.* A group of Ecuadorian villagers/plaintiffs brought suit against Texaco claiming a number of environmental violations and ecological abuses by the company. *Id.* In 1998, an agreement was struck between Texaco and the Ecuadorian government, whereby the former paid some \$40 million for what would be cleanup costs. *Id.* In 2001, Chevron bought Texaco. *Id.* Subsequently, a class action, toxic tort suit was brought against Chevron, and in 2011 an Ecuadorian court ruled that Chevron owed damages in the amount of \$18 billion. *Id.* That amount was later reduced to \$9.5 billion on appeal. *Id.* Thereafter, the plaintiffs sought to enforce the judgment in the United States, but Chevron opposed this motion on numerous grounds. *Id.* One of the successful defenses involved claiming that the 2011 judgment was procured through fraud and corruption and that the American attorneys had acted corruptly as well. *Id.* One such lawyer has, in fact, since been disbarred by the state of New York. *Id.* Although in 2018 the Ecuadorian Constitutional Court affirmed the \$9.5 billion award, in September of 2018 an international tribunal operated out of the Hague disallowed that judgment, holding that the 1998 settlement cleared Chevron and noting that the award granted in Ecuador "was procured through fraud, bribery and corruption and was based on claims that had been already settled and released by the Republic of Ecuador years earlier." *Id.*

209. Then there is the issue of judgments from the courts being translated into tangible remedies for claimants. While Palkhivala and Dadachanji rightly noted that the Indian judiciary (particularly the Supreme Court) has been robust at times in protecting the rights of the harmed *on paper*, an impressive literature has documented how frequently the effects of these rulings are neither felt at the community nor the individual level. For studies that have discussed this point, see, e.g., ROBERT MOOG, *WHOSE INTERESTS ARE SUPREME: ORGANIZATIONAL POLITICS IN THE CIVIL COURTS IN INDIA* 135–46 (1997); Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary*, 19 POLY STUD. J. 140 (1990); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 561 (1985); Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 302, 305–06 (1994); Galanter & Krishnan, *supra* note 53, at 797; Krishnan & Thomas, *supra* note 53, at 342; Krishnan et al., *supra* note 53, at 181. Even with respect to the \$470 million settlement that the Indian Supreme Court approved, there still remain countless victims who have not received what they were due. See Alys Francis, *Why Are Bhopal Survivors Still Fighting for Compensation?*, BBC NEWS (Dec. 2, 2014), <https://www.bbc.com/news/world-asia-india-30205140>.

210. Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 468 (2004).

economy in 1991—the high prevalence of solo practitioners with limited resources and skill sets remains to this day.²¹¹

Yet, none of these points were acknowledged by Palkhivala or Dadachanji in their sworn statements. More disheartening was the fact that even though the plaintiffs, under the *Gilbert* and *Piper Aircraft* tests, had sound arguments for why the case ought to be heard in the United States, Judge Keenan still opted to rule that the Indian judiciary was not just an adequate forum but that it was superior to its American counterpart—a curious conclusion, given the mountain of evidence pointing in the other direction.

2. Other Concerns with the Later MDL Rulings

Recall that in the 1989 MDL case—where Judge Keenan had originally praised the plaintiffs’ lawyers for their good work in trying to secure justice for the Bhopal victims—he nevertheless concluded that the U.S. courts were “without jurisdiction to award the [lawyers] compensation under section 475 of the New York Judiciary Law or any other theory.”²¹² On that same page of his opinion, Judge Keenan also quoted the Second Circuit’s judgment affirming his earlier 1986 forum non conveniens ruling:

Once [the district court] dismisses the United States proceedings on grounds of forum non conveniens it ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to enforce here a final and conclusive Indian money judgment.²¹³

How are the final few words of this passage—“to enforce here a final and conclusive Indian money judgment”—to be interpreted? On its face, enforcement may simply mean ensuring that the plaintiffs receive compensation for their suffering. But a logical extension of this point would also include that the lawyers be compensated for the work that they did on behalf of the plaintiffs. After all, no one—not Judge Keenan, the Second Circuit, or the lawyers themselves—had suggested that all of this advocacy be done *pro bono*. Granting this proposition then, it seems curious that the judge would not recognize this fact and adhere to the spirit of the Second Circuit’s language, which would have permitted the

211. For a study that has discussed this point, see Krishnan & Thomas, *supra* note 53, at 349–50.

212. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, in Dec., 1984, MDL No. 626, No. 21–38 (JFK), 1989 WL 66673, at *2 (S.D.N.Y. June 14, 1989).

213. *Id.* (emphasis in original).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 741

plaintiffs' lawyers to collect their fees because of the "final and conclusive" nature of the judgment reached between the parties.

Then, in the related 1993 MDL case, where these lawyers returned to Judge Keenan for reconsideration of this matter, his analysis appears even more perplexing. This time he criticized the plaintiffs' lawyers for failing to raise their compensation demands in front of the Indian courts.²¹⁴ But as he well knew, the lawyers could not do so because, at the time, they were denied visas to enter India.²¹⁵ He then chastised the American lawyers for not hiring local Indian lawyers in a timely fashion to make the case on their behalf to the Indian courts.²¹⁶ However, the American lawyers in fact did retain local counsel;²¹⁷ they were simply unsuccessful as the Indian courts held that the lawyers had no standing because of the time that had lapsed between the omnibus settlement and their petition seeking payment of fees.

When the case returned to Judge Keenan in 1993, he used this exact rationale—that the lawyers' "efforts to protect their [interests] were too little, too late"—as justification for why they could not pursue enforcement against Union Carbide in the United States.²¹⁸ Yet, in reality, there was no statute of limitations problem *under the New York law* that they were referencing.²¹⁹ Seemingly, the conclusion to draw was that Judge Keenan was determined not to provide the lawyers with a federal forum in which to proceed.

214. *Union Carbide Corp. Gas Plant Disaster v. Union Carbide Chem. and Plastics Co.*, Nos. M21–38 (JFK), MDL 626, 1993 WL 541230, at *4 (S.D.N.Y. Dec. 28, 1993).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* N.Y. JUD. LAW § 475 (McKinney 2019) ("From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; *and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination.* The court upon the petition of the client or attorney may determine and enforce the lien." (emphasis added)). Indeed, as the statute says and even with the settlement reached in India, the lien would have remained intact, contrary to Judge Keenan's assertion that this claim was time-barred.

3. Concerns with the Later Non-MDL Cases

As the above discussion describes, in the *Sajida Bano* and *Sahu* cases, Judge Keenan heard multiple motions beginning in 2000 that spanned the next fifteen years. In not one of these matters did he allow the plaintiffs to proceed to trial. It is true that each of his decisions withstood appellate scrutiny. The question, however, is whether he was willing to take into account all of the facts in these later cases so that he could make fully informed judgments.

Consider one conspicuous instance that highlights this point. In his 2014 ruling dismissing the plaintiffs' claims in *Sahu II*, Judge Keenan opted not to allow what he referred to as "late-breaking declarations" from key witnesses who stated in sworn affidavits that they could connect Union Carbide-U.S. to Union Carbide-India's plant.²²⁰ Such a nexus was crucial for the plaintiffs' argument because it would then allow them to assert that the parent company was potentially liable for the actions conducted by the subsidiary. In particular, they argued that the Bhopal facility—which had been built under American design plans—was continuing to pollute the surrounding area well after the 1984 gas leak and that it had done little to abate this contamination. The two witnesses were Lucas John Couvaras and T.R. Chauhan. Couvaras was a Union Carbide-U.S. employee from 1971 through 1981.²²¹ He was charged with overseeing "the engineering and construction of the [Union Carbide-India] plant."²²² Importantly, as Couvaras formally declared:

The process design reports for the UCIL [i.e., Union Carbide India Limited] plant were prepared by [the] UCC [Union Carbide Corporation]-Technical Center in Charleston, West Virginia. The reports were reviewed and approved by the Managers of the various groups who worked on the preparation of these reports before they were sent to India.²²³

For his part, Chauhan was a resident of Bhopal who worked as a key official at the facility where the leak originated.²²⁴ He served in this

220. See *Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156, 2014 WL 3765556, at *9 (S.D.N.Y. July 30, 2014).

221. See Declaration of Lucas John Couvaras, *Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156, 2014 WL 3765556, at *9 (S.D.N.Y. July 30, 2014).

222. *Id.*

223. *Id.*

224. See Declaration of T.R. Chauhan, *Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156, 2014 WL 3765556, at *9 (S.D.N.Y. July 30, 2014).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 743

position from 1975 to 1985.²²⁵ He confirmed that Couvaras was the person in charge of the “detail design and erection of the [Indian] plant.”²²⁶ Furthermore, he claimed that any site inspections and safety oversight were the responsibility of Couvaras. More broadly, Chauhan also stated that the technology the Bhopal plant used was always directly transferred from the parent company’s offices in the United States.²²⁷

Both these affidavits provided *prima facie* evidence that a direct link existed between Union Carbide-U.S. and Union Carbide-India. Judge Keenan, however, did not see it this way. He rejected the idea that Couvaras was a Union Carbide-U.S. employee. Rather, Judge Keenan found that Couvaras was, for all intents and purposes, exclusively a Union Carbide-India official. Couvaras’ role as a plant manager fell under the subsidiary’s ambit; in the company’s annual reports, he was listed as an employee of the subsidiary and his direct supervisors were Indian officials in Mumbai.²²⁸ In addition, Judge Keenan disregarded Chauhan’s statements. Compared to the declaration by Ranjit Dutta, a plant manager at the Bhopal facility who claimed that Couvaras was only a Union Carbide-India employee, Chauhan’s affidavit offered “no basis” to support the plaintiffs’ contention.²²⁹ From there, Judge Keenan then disposed of the other submitted causes of action and found that the perpetuation of the ongoing contamination could not be anything but the responsibility of Indian company officials.²³⁰ In fact, he forcefully stated (in bolded heading) that: “*No Reasonable Juror Could Find for Plaintiffs on Any of Their Theories.*”²³¹

And that is where the question lies. Is it true that this case should not have proceeded to a jury? For one thing, it was quite remarkable that Judge Keenan took the word of a third party (Dutta) on the employment status of Couvaras—over Couvaras himself. As one of the lead lawyers for the plaintiffs, Marco Simons of EarthRights International bemoaned after the ruling, “*If you ever thought you knew your own employer’s identity, think again—your testimony on that subject isn’t even really evidence.*”²³² The plaintiffs also provided analysis from two renowned scientific experts who stated that it was inconceivable that the

225. *Id.*

226. *Id.*

227. *Id.*

228. *See Sahu v. Union Carbide Corp.*, No. 07 Civ. 2156, 2014 WL 3765556, at *9 (S.D.N.Y. July 30, 2014).

229. *Id.* at *9–10.

230. *Id.* at *7–13.

231. *Id.* at *10 (emphasis added).

232. *See Sahu II, Bhopal Medical Appeal*, <http://www.bhopal.org/sahu-ii/> (last visited Jan. 31, 2020).

functioning of the Bhopal plant could have operated independently of Union Carbide-U.S. Yet, Judge Keenan also rejected this evidence out-of-hand. In 2016, the Second Circuit heard the plaintiffs' appeal. Interestingly, the appellate court noted that Couvaras "was lent by UCC to UCIL," but that he was primarily an employee of the Indian facility.²³³ The evidentiary connections to the parent company were too tenuous and, as such, it did not find that Judge Keenan abused his discretion when dismissing the case.²³⁴

However, if the Second Circuit and Judge Keenan could have different interpretations on this important issue—which is arguably one of a *factual* nature—should this then not have come under the purview of what a jury ought to have heard? If so, perhaps a jury might have found that a stronger link indeed existed between Union Carbide-U.S. and Union Carbide-India. The point is that, after nearly thirty years of Bhopal-based cases coming in front of Judge Keenan, there was little doubt as to the way he would rule. For this reason alone, the system of how matters are assigned to judges needs to be reconsidered.

V. CONCLUSION

This Article began by referencing Professor Katharine Macfarlane's work on the non-randomized selection process of cases in the federal district court of the SDNY.²³⁵ As shown by her research, and then confirmed by this Bhopal narrative, there is a real question as to whether the justice being administered by existing protocol best serves the interest of all parties involved—and, more broadly, the interests of society at large.

In various places in her article, Professor Macfarlane notes that opposition to the related case's rule stems from a justifiable concern that bias—or even the appearance of it—may set in on the part of the judge.²³⁶ It is important not to allow judges who may have a predisposition towards an issue or subject area to decide which cases they are assigned. "Drawing an unfavorable judge is fair when it is a matter of luck, and nothing more."²³⁷

Probing this point further, this final Part briefly explores a particular area that law and psychology scholars have studied now for some time: confirmation bias. A few years back, Eyal Peer and Eyal Gamliel

233. See *Sahu v. Union Carbide Corp.*, 650 F. App'x 53, 57 (2d Cir. 2016).

234. *Id.* at 59.

235. See Macfarlane, *supra* note 24.

236. *Id.* at 207, 227–33, 235–36, 240–42.

237. *Id.* at 227.

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 745

published a useful literature review stating that when “people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the contrary.”²³⁸ This phenomenon can also include judges and their decision-making.²³⁹ Their observation is one that previous scholars have also noted. Moa Lidén, Minna Gräns, and Peter Juslin recently found that judges in Sweden who ordered defendants to be held in pre-trial detention facilities were more likely, because of a confirmation bias, to subsequently find these defendants guilty.²⁴⁰ Separately, Eric Rassin, Anita Eerland, and Ilse Kuijpers conducted an experimental study that included judges as part of the respondent sample. They determined that once an individual is labelled as a primary suspect in a criminal case, subsequent evidence that is gathered is considered only if it confirms the original viewpoint.²⁴¹ Otherwise it is discarded.²⁴²

In reflecting on this point, one question to ask is whether the thirty years of Bhopal rulings by Judge Keenan might be an example of confirmation bias.²⁴³ Of course, without formal experimentation, it is not possible to answer this question with certainty. Still, consider that the matters that came before Judge Keenan were not one single case. Rather they involved different parties, different issues, and different questions of law and fact. Furthermore, the later cases in particular were not

238. See Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV. 114, 114–15 (2013).

239. *Id.* at 115.

240. See Moa Lidén et al., ‘*Guilty No Doubt*’: *Detention Provoking Confirmation Bias in Judges’ Guilt Assessments and Debiasing Techniques*, 25 PSYCHOL. CRIME & L. 219, 237–38 (2018).

241. See Eric Rassin et al., *Let’s Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231, 233 (2010); see also Peer & Gamliel, *supra* note 238, at 115.

242. See Rassin et al., *supra* note 241, at 240.

243. This broader, more general phenomenon of confirmation bias has been discussed in the psychology literature for decades. See JONATHAN BARON, *THINKING AND DECIDING* (4th ed. 2000); HEURISTICS AND BIASES: *THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002); *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUSTICE* 6–8 (1980); D.N. Perkins et al., *Everyday Reasoning and the Roots of Intelligence*, in *INFORMAL REASONING AND EDUCATION* 83, 83–106 (James F. Voss, David N. Perkins, & Judith W. Segal eds., 1991); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 107–88 (1993); Peer & Gamliel, *supra* note 238, at 115–16; Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL. 107 (1980); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

related to the MDL, forum non conveniens decision—yet it was that first judgment and the reiteration of that rationale that appeared repeatedly throughout Judge Keenan’s three decades of rulings. Put another way, that initial opinion appears to have strongly shaped Judge Keenan’s mindset when it came to: how the tragedy unfolded, where the case should be adjudicated, who should be liable, and how evidence should be evaluated.

In terms of this last issue, the different types of evidence that were presented by the different claimants in the later cases did not seem to make a difference for Judge Keenan. He was unmoved by the subsequent legal arguments presented, as he continued to rule that an American court could not be a proper venue for claims against Union Carbide. Within the scholarly discourse then, Judge Keenan’s behavior might seem to comport with those theorists who argue that confirmation bias involves the “seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”²⁴⁴

In asserting this point, however, it is crucial not to suggest that Judge Keenan may have engaged in this conduct in a purposive fashion. Raymond Nickerson, a leading scholar who has studied this subject, notes that:

[C]onfirmation bias connotes a less explicit, less consciously one-sided case-building process. It refers usually to unwitting selectivity in the acquisition and use of evidence. The line between deliberate selectivity in the use of evidence and unwitting molding of facts to fit hypotheses or beliefs is a difficult one to draw in practice, but the distinction is meaningful conceptually, and confirmation bias has more to do with the latter than with the former. The assumption that people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so, is fundamental to the concept.²⁴⁵

244. See Nickerson, *supra* note 243, at 175; see also Birte Enough & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535 (2001); Peer & Gamliel, *supra* note 238, at 116 n.19, 117–18 n.32 (discussing Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAVIORAL SCI. & L. 113 (1994)); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 855 (2015).

245. See Nickerson, *supra* note 243, at 175–76 (emphasis omitted).

2020] *HOW INDIAN VICTIMS FAILED TO GET JUSTICE* 747

If Nickerson is correct that those who demonstrate confirmation bias are not doing so in a cognizant fashion, then there is no reason to believe that Judge Keenan had an intentional predisposition against the various Bhopal-based plaintiffs. Nonetheless, his rulings certainly had a pattern—one that negatively affected the different claimants over a three decade-period. Moreover, the reputation of a judge having this type of tendency also has the possibility of deterring *potential* claimants from pursuing a cause of action for fear that there is no point in doing so. Professor Marc Galanter was asked by a law firm in the 2000s whether he would be willing to play a similar role in a new case against Union Carbide.²⁴⁶ Professor Galanter told the firm that it was futile to try and bring such a lawsuit so long as Judge Keenan remained as the presiding judge.²⁴⁷ The firm thereafter decided not to proceed and the claimants' case was never filed.

To close, in order for plaintiffs, particularly those who are in weaker positions, to receive a fresh review in federal court, there must be a different method in how matters are assigned to judges²⁴⁸—especially after an MDL process has come to an end. Drawing on Professor Macfarlane's related cases research, one proposal might be to eliminate internal courthouse rules that allow for all judges, including those on

246. Telephone Interview with Marc Galanter, Professor Emeritus, University of Wisconsin-Madison School of Law (Apr. 7, 2019) (discussing his reflections of the Bhopal tragedy, 35 years later). Although Union Carbide was the party listed in the cases in front of Judge Keenan during the 2000s, technically speaking, in 2001, Dow Chemical acquired Union Carbide as part of a merger deal. *Dow Completes Merger with Union Carbide*, INT'L CAMPAIGN JUST. BHOPAL (Feb. 6, 2001), https://www.bhopal.net/old_bhopal_web/oldsite/dow_completes_merger.html.

247. Telephone Interview with Marc Galanter, *supra* note 246; *see also* Nityanand Jayaraman, *Justice Compromised*, HINDU (July 3, 2012), <https://www.thehindu.com/opinion/op-ed/justice-compromised/article3595349.ec> (questioning whether the plaintiffs could receive an unbiased hearing in front of Judge Keenan after the 2012 ruling). Interestingly, in 1995, the Third Circuit Court of Appeals upheld a federal district court ruling in an admiralty case that involved whether a matter should be heard in the United States or in India. The case dealt with a plaintiff-child who was injured on an Indian ship that was traveling in international waters. Immediately after the injury, the child was airlifted first to Antigua and then to New York for medical treatment. She and her family brought suit in New York against the shipping company, but, while the ship was docked in Philadelphia, the case was transferred to federal court in the Eastern District of Pennsylvania. The federal judge there refused to issue a forum non conveniens motion, per the defendant's request. The judge held that the affidavits from plaintiffs' expert witnesses were convincing as to why the Indian courts were not an adequate forum for hearing this matter. One of the experts was the prominent Indian corporate lawyer, Shardul Shroff. The other was Professor Marc Galanter, who made an almost identical set of arguments that he provided in his affidavit for the 1986 Bhopal case. On appeal, the Third Circuit affirmed, except that it ruled that any damages calculated should be done using Indian rupees rather than U.S. dollars. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1220 (3d Cir. 1995).

248. *See* Macfarlane, *supra* note 24, at 235–37.

senior status, to pre-select cases and instead simply implement a lottery system for all assignments.²⁴⁹ Another could be to mandate public disclosure of all case assignments to all judges, which would cast sunlight on those who might be seeking to hoard certain matters onto their docket and, thereby, possibly deter future manipulative behavior.²⁵⁰ And a third solution could be to “require . . . [a party] to move for the related case designation and . . . [then allow for] the other party . . . to oppose”²⁵¹ it. This last proposal would also require that the matter be handled by a different judge than the one who is the focus of the motion.²⁵²

In sum, the hope is that the research here will prompt interested observers to reflect on ways to make the MDL and post-MDL processes more equitable for future litigants in U.S. federal courts.

249. *Id.* at 235–36.

250. *Id.* at 236.

251. *Id.*

252. *Id.* at 236–37. Or alternatively, the three-judge committee that evaluates related case requests for active judges could also do the same for senior status judges. *Id.* at 246.