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Admiralty Law and Jurisdiction in Air Crash Cases

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ADMIRALTY LAW AND JURISDICTION IN AIR CRASH CASES

JAMES W. HUSTON
BILL O'CONNOR

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THE DETERMINATION of whether a tort action is within the federal court's admiralty jurisdiction traditionally depended on the location of the wrong. If the wrong occurred on or over navigable waters, the action was within the federal court's admiralty jurisdiction; if the wrong occurred on land, the action was not within this jurisdiction. Navigable waters were considered waters within the ebb and flow of the tide. Later, the definition of navigable waters was expanded to include lakes and rivers.¹ The historic view of the Supreme Court was that the admiralty tort jurisdiction of the federal courts would be determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.²

The Supreme Court's 1972 landmark decision in *Executive Jet Aviation, Inc. v. City of Cleveland* changed the traditional locality-based rule and added the requirement that the tort must "bear a significant relationship to traditional maritime activity."³ Since 1972, courts have struggled to define which aviation torts properly fall within the federal courts' admiralty jurisdiction.

Cases involving aviation accidents are often brought into federal court based on admiralty jurisdiction. In many cases there is an alternative basis for federal jurisdiction, such as diversity of citizenship or the Warsaw Convention. However, claimants often seek to invoke admiralty jurisdiction in order to have substantive maritime law apply to their wrongful death and survival claims arising out of a fatal accident. A claimant's desire to have general maritime law apply is rooted in the possibility of a large and unpredictable recovery for the decedent's pre-impact pain and suffering as well as punitive damages – elements of damage that may be unavailable under state wrongful death and survival statutes.

However, the federal court's admiralty jurisdiction over an aviation accident is usually only the first hurdle plaintiffs must cross before substantive maritime law will apply. A federal choice-of-law analysis may compel the application of state law instead of maritime law to a particular issue in a case that is within the court's admiralty jurisdiction.

Also, the *Executive Jet* test for jurisdiction does not apply to all aviation accidents occurring on navigable waters. For example,

¹ 53 U.S. 443, 450-51 (1851).

² 404 U.S. 202, 205 (1971).

³ 409 U.S. 249, 268 (1972).

aviation accidents that fall under the Death on the High Seas Act ("DOHSA") have an independent basis for federal jurisdiction because the statute presents a federal question. "[I]t may be considered as settled today that [DOHSA] gives the federal admiralty courts jurisdiction over such wrongful death actions."⁴ Commercial aviation accidents that occur on the high seas beyond twelve nautical miles of the United States shoreline are governed by DOHSA.⁵ Significantly, pre-impact pain and suffering and punitive damages are unavailable under DOHSA.⁶

The following discussion applies to aviation accidents that do *not* fall under DOHSA, such as cases involving commercial aviation accidents in the ocean but within state territorial waters, or cases involving a crash into a lake or river. The aim of the discussion is to provide an analytical framework for determining whether admiralty jurisdiction is properly invoked in aviation tort cases. Four categories of aviation accidents will be evaluated. The article concludes that admiralty jurisdiction is properly invoked in three of the four scenarios (the "fortuitous accident" being the exception). However, even if the federal court's jurisdiction lies in admiralty, a federal choice of law analysis leads to the conclusion that the recoverable elements of damage for the death of a non-seaman should be determined in accordance with the law of the decedent's domicile state.

Consider a hypothetical fact pattern of a California Airways flight from Vancouver, British Columbia, to San Diego, California. This flight would originate near the Pacific coast, pass over the Strait of Georgia and Washington State, and arrive in Southern California. The entire flight would be over land near the Pacific Ocean or over navigable waters for a short time. Because the scheduled flight plan is either over land or within a few miles of the shore, the flight would be authorized to dispatch without water survival equipment such as life rafts.

In this hypothetical, the aircraft is a brand new, two-engine Ryan 848. One of the engines is over-tempering. This is not a life-threatening situation, but the crew must troubleshoot and determine whether to shut the engine down and land. The crew requests a deviation from their flight plan to evaluate the engine problem over the Pacific, away from other aviation traffic.

⁴ *Id.* at 263.

⁵ 46 U.S.C. app. § 761(b) (2000).

⁶ See *Dooley v. Korean Airlines*, 524 U.S. 116, 118 (1998); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

While over the Pacific, the 848 experiences catastrophic engine failure which throws several blades through the wing, causing a loss of control. The aircraft plunges into the ocean three miles off Pacific Beach.

Should federal courts exercise admiralty jurisdiction over the wrongful death and survival claims brought by the passengers' representatives? Under *Executive Jet*, the answer is no.

I. STANDARD FOR APPLICATION OF MARITIME JURISDICTION TO AVIATION TORTS

Executive Jet Aviation, Inc. v. City of Cleveland is the leading Supreme Court case on admiralty jurisdiction over aviation accidents.⁷ The Court in *Executive Jet* expressed a narrow view of which aviation accidents fall within the federal courts' admiralty jurisdiction. *Executive Jet* involved a charter flight from Cleveland, Ohio to White Plains, New York that crashed into Lake Erie shortly after take off.

Under *Executive Jet*, maritime law applies when the wrong "occurs or is located on or over navigable waters," and the wrong "bear[s] a significant relationship to traditional maritime activity."⁸ This test is sometimes referred to as the "locality-plus test." *Executive Jet* resolved a split among the circuit courts and superseded prior Supreme Court cases using a strict locality-based standard. For example, the Supreme Court previously had held that admiralty jurisdiction did not apply where a longshoreman standing on a pier was struck by a ship's sling, knocked into the water, and fatally injured because "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land."⁹ Yet the same court held admiralty jurisdiction did apply where a longshoreman working on a vessel was struck by a hoist and knocked onto a pier because the claim arose on the vessel.¹⁰ This lack of a coherent principle to guide application of admiralty jurisdiction led to the "locality-plus" test announced in *Executive Jet*. In support of its decision to impose the additional "significant relationship" requirement, the Supreme Court in *Executive Jet* noted "[i]t is far more consistent with the history and purpose of admiralty to require also that

⁷ 409 U.S. 249 (1972).

⁸ *Id.* at 268.

⁹ *Id.* at 255 (quoting *Smith & Son v. Taylor*, 276 U.S. 179, 182 (1928)).

¹⁰ *Id.* (citing *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935)).

the wrong bear a significant relationship to traditional maritime activity.”¹¹

A relevant question in applying the “significant relationship” prong of the *Executive Jet* standard is “whether a tortfeasor’s activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply.”¹² Traditional maritime law issues include a ship’s seaworthiness, maintenance and cure issues, issues pertaining to maritime liens, the general average, captures and prizes, limitation of liability, damage to cargo, and salvage claims.¹³

As to application of maritime law to aviation tort cases, the Supreme Court stated that aviation tort cases are not traditionally subject to admiralty jurisdiction because the “[r]ules and concepts . . . [of maritime law] are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road.”¹⁴ Thus, “[t]he matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or over water.”¹⁵ The Court also made it clear that maritime law does not apply to aviation tort cases in the absence of a transoceanic flight.¹⁶

II. THE “POTENTIALLY DISRUPTIVE IMPACT ON MARITIME COMMERCE” TEST SHOULD NOT APPLY TO AVIATION ACCIDENTS

Litigants often cite to subsequent Supreme Court cases that purportedly expand the *Executive Jet* standard to include consideration of whether the alleged wrong has a potentially disruptive impact on maritime commerce in order to satisfy the significant relationship to traditional maritime activity requirement.¹⁷

¹¹ *Id.* at 268.

¹² *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 539 (1995).

¹³ *Executive Jet*, 409 U.S. at 270.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See id.* at 274 n.26.

¹⁷ *See Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 527, 538 (1995); *Sisson v. Ruby*, 497 U.S. 358, 363 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982). *Foremost*, *Grubart*, and *Sisson* expanded the *Executive Jet* test to non-aviation torts. *Sisson* involved a fire that caused damage to a marina and moored pleasure yachts. *Sisson*, 497 U.S. at 360. *Foremost* involved a pleasure boat

However, none of these subsequent Supreme Court cases addresses admiralty jurisdiction over aviation torts. Nor do the cases attempt to modify the holding in *Executive Jet*. Indeed, there are only two examples of a court applying this factor to an aviation accident: *Brown v. Eurocopter, S.A.*,¹⁸ and *Williamson v. Petroleum Helicopters, Inc.*,¹⁹ neither of which was appealed. Both decisions involved transportation to oil rigs in the Gulf of Mexico.²⁰ The flights had a significant relationship to traditional maritime activity because the helicopters were performing a function traditionally carried out by crew boats.²¹ As demonstrated below, the cases really do not reflect any change from *Executive Jet* because the district courts have uniformly found that helicopter transport in oil rig operations satisfies the *Executive Jet* test regardless of whether the activity poses a potential hazard to maritime commerce.

Application of the "potential disruptive impact" test would return us to the pre-*Executive Jet* locality-based standard because every commercial aviation accident on navigable waters would likely have a potential and actual disruptive impact on maritime commerce. When an aircraft goes down over navigable waters, there inevitably will be an extensive search and rescue effort. Wreckage must be recovered, and the cause of the accident thoroughly investigated. All of these activities require maritime resources. Because a particular aviation accident over navigable waters can never be anticipated, the necessity for maritime resources in a time of crisis will always have a potentially disruptive impact on maritime commerce. If this factor is applied, all that would be required for maritime jurisdiction would be the pre-*Executive Jet* locality test. Application of the "potential disruptive impact" factor is thus inappropriate. The Supreme Court has never applied this factor to an aviation case, and for a lower court to do so would be contrary to *Executive Jet*.

collision on a Louisiana river. *Foremost*, 457 U.S. at 669. *Grubart* involved a Chicago flood that was caused by barge owners' operations near a freight tunnel under the riverbed. *Grubart*, 513 U.S. at 530. In so doing, the Supreme Court also considered whether the activity giving rise to the cause of action was sufficient to pose a hazard to maritime commerce. *Grubart*, 513 U.S. at 552; *Sisson*, 497 U.S. at 362; *Foremost*, 457 U.S. at 675 n.5.

¹⁸ 38 F. Supp. 2d 515, 518 (S.D. Tex. 1999).

¹⁹ 32 F. Supp. 2d 456, 459 (S.D. Tex. 1999).

²⁰ *Brown*, 38 F. Supp. 2d at 516; *Williamson*, 32 F. Supp. at 457.

²¹ *Brown*, 38 F. Supp. 2d at 518; *Williamson*, 32 F. Supp. at 459.

III. "FORTUITOUS" AVIATION ACCIDENTS IN NAVIGABLE WATERS DO NOT SUPPORT APPLICATION OF MARITIME LAW UNDER THE *EXECUTIVE JET* STANDARD

Aviation accidents would not seem to implicate traditional admiralty issues such as seaworthiness, maintenance and cure, maritime liens, general average, captures and prizes, limitation of liability, damage to cargo, and salvage claims. In addition, the wrongs alleged by plaintiffs in such cases often do not occur on navigable waters even where the crash itself does. The inadequate maintenance or operation of the aircraft that may have led to a crash often occurs on land. In other cases, the reason the flight crashed into the navigable waters is that the pilots were attempting to troubleshoot problems with their aircraft over water where no one on the ground could be harmed, rather than over a heavily populated area.

Moreover, commercial carriers operate under Title 14 Code of Federal Regulations Part 121 on regularly scheduled flights from points that are accessible by land and sea.²² All aspects of accident flights are governed by an extensive and pervasive federal regulatory scheme promulgated to address the unique and modern character of commercial air transportation.²³ The "rules of the road" are governed by federal regulation, not traditional admiralty concepts.

In most cases, as in *Executive Jet*, the only connection between an accident and traditional maritime concepts is its occurrence on navigable waters. The Supreme Court, however, has held this alone is inadequate to support application of maritime law. "Neither the fact that a plane goes down on navigable waters nor the fact that the negligence 'occurs' while a plane is flying over such waters is enough to create a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction."²⁴

In *Executive Jet*, the Supreme Court hypothesized that: "[a]n aircraft . . . [flying from New York to London and crashing in the mid-Atlantic] might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne

²² 14 C.F.R. § 121 (2004).

²³ See *id.*

²⁴ *Executive Jet*, 409 U.S. at 270-71.

vessels.”²⁵ The Ninth Circuit applies the “locality-plus” *Executive Jet* analysis discussed above, and also considers the element of whether the aircraft was performing a function that, absent the advent of air travel, could only be performed by a waterborne vessel.²⁶ Accordingly, an aviation tort is generally not subject to federal maritime jurisdiction where the accident’s occurrence over navigable waters is merely “fortuitous.”

IV. A SURVEY OF CASES APPLYING THE *EXECUTIVE JET* STANDARD TO AVIATION TORTS

The cases regarding what constitutes a significant relationship to traditional maritime activity since *Executive Jet* break down into four distinct categories.

The first category involves aviation accidents where a helicopter is transporting passengers to and from oil rigs in territorial waters. In these cases, the courts find a significant relationship to traditional maritime activity because the helicopter is performing a service normally conducted by crewboat vessels.

The second category is aviation accidents involving sea-planes. In these cases, the courts find a significant relationship to maritime activity because the problems of taking off and landing at sea differ from those encountered with conventional aircraft.

The third category involves transoceanic or island voyages where, but for the advent of air transportation, the only way to reach these destinations would be by sea. This category is analogous to the *Executive Jet* dictum of a transoceanic flight from New York to London. The courts find a significant relationship to maritime activity in these cases because transoceanic air travel fulfills a function which was traditionally performed by waterborne vessels.

The fourth category involves “fortuitous” aviation accidents in navigable waters. This category involves fact patterns where

²⁵ *Id.* at 271.

²⁶ See, e.g., *Williams v. FAA*, 711 F.2d 893, 895-96 (9th Cir. 1983) (holding that maritime law applies to an aircraft crash en route between Hawaii and California because the only alternative means of reaching Hawaii is by ship); *Roberts v. United States*, 498 F.2d 520, 524 (9th Cir. 1974) (“The transoceanic transportation of cargo is an activity which is readily analogized with ‘traditional maritime activity.’ Indeed before the advent of aviation such shipping could only be performed by waterborne vessels.”); see also *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219 (1986) (stating in dicta that admiralty jurisdiction may apply to a helicopter crash ferrying passengers to an offshore oil rig because traditionally the only way to get passengers to an oil rig is by boat; therefore, the helicopter would be fulfilling a traditional maritime role).

water and air travel are not the exclusive means of access. In these cases, the courts find that a significant relationship to maritime activity does not exist.

The four categories provide a framework for analyzing maritime jurisdiction problems.

A. CATEGORY 1: ACCIDENTS INVOLVING HELICOPTER TRANSPORT TO OIL RIGS SUPPORT MARITIME JURISDICTION

The following cases involve aviation accidents where a helicopter is transporting passengers to and from oil rigs in territorial waters. In these cases, the courts find a significant relationship to traditional maritime activity because the helicopter is performing a service normally conducted by crewboat vessels.

In *Ledoux v. Petroleum Helicopters, Inc.*, a helicopter crashed at sea.²⁷ The court found that admiralty jurisdiction existed because the helicopter was being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures.²⁸

In *Fosen v. United Tech. Corp.*, a helicopter crashed in the North Sea off the coast of Norway.²⁹ The accident occurred when the helicopter was transporting Phillips Petroleum employees to an oil rig.³⁰ The helicopter crashed about thirty miles from the coastline,³¹ and the court found that extensive offshore operations fall within the court's admiralty jurisdiction.³²

In *Pan Air Corp. v. Texaco, Inc.*, the court exercised admiralty jurisdiction over claims (or a claim) for property damage arising out a helicopter crash on the outer Continental Shelf.³³ The court reasoned that the crash of a helicopter while it is being used in place of a vessel to ferry personnel and supplies to and from an offshore drilling structure bears the type of significant relationship to traditional maritime activity necessary to invoke admiralty jurisdiction.³⁴

²⁷ 609 F.2d 824 (5th Cir. 1980).

²⁸ *Id.*

²⁹ 484 F. Supp. 490, 493 (S.D.N.Y. 1980).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 496.

³³ 684 F.2d 1102, 1111-12 (5th Cir. 1982).

³⁴ *Id.*

In *Garrett v. Air Logistics, Inc.*, a helicopter crashed in the Gulf of Mexico.³⁵ Admiralty jurisdiction existed because helicopters being used in place of a vessel to transport personnel and material to and from an offshore drilling structure bears a significant relationship to traditional maritime activity.³⁶

In *Brown v. Eurocopter*, a helicopter crashed in the Gulf of Mexico.³⁷ Admiralty jurisdiction applied because the use of helicopters to transport personnel to and from offshore drilling platforms is close enough in spirit to the use of boats to perform such tasks to show the necessary relationship to traditional maritime activity.³⁸

In *Williamson v. Petroleum Helicopters, Inc.*, a helicopter crashed in the Gulf of Mexico.³⁹ Admiralty jurisdiction existed because the use of helicopters to transport personnel to and from offshore platforms is close enough in spirit to the use of boats to perform such tasks to show the necessary relationship.⁴⁰

B. CATEGORY 2: ACCIDENTS INVOLVING SEA-PLANES SUPPORT MARITIME JURISDICTION

The second category of cases consists of aviation accidents involving seaplanes. In such cases the courts find a significant relationship to maritime activity because the problems of taking off and landing at sea are distinctly maritime and differ from those encountered with conventional aircraft and therefore there is a relationship to traditional maritime activity.

In *Hark v. Antilles Airboats, Inc.*, a Grumman Goose crashed shortly after water takeoff in harbor waters.⁴¹ The highest altitude the Goose reached was 200 feet.⁴² The scheduled flight was from St. Thomas to St. Croix.⁴³ Admiralty jurisdiction existed in this case because the problems of take-off and landing of a seaplane differ from those encountered with conventional aircraft and are influenced by the "marine" nature of the runway used.⁴⁴

³⁵ Civ. A. No. 95-2190, 1996 WL 492300, at *1 (E.D. La. Aug. 26, 1996).

³⁶ *Id.* at *2.

³⁷ 38 F. Supp. 2d 515 (S.D. Tex. 1999).

³⁸ *Id.* at 518.

³⁹ 32 F. Supp. 2d 456, 457 (S.D. Tex. 1999).

⁴⁰ *Id.* at 459.

⁴¹ 355 F. Supp. 683, 684 (D.C.V.I. 1973).

⁴² *Id.* at 685.

⁴³ *Id.* at 684.

⁴⁴ *Id.* at 686.

In *Hubschman v. Antilles Airboats, Inc.*, a Grumman Goose crashed a few miles northeast of the Puerto Rican Island of Culebra.⁴⁵ The flight departed from St. Thomas and was heading to Fajardo, Puerto Rico.⁴⁶ Admiralty jurisdiction existed because the pilot attempted to make a sea landing after both engines malfunctioned.⁴⁷ Under the circumstances, the court found little difference between a hydroplane capable of navigation on water that crashed and a ship.⁴⁸

In *Icelandic Coast Guard v. United Tech. Corp.*, a helicopter took off from an Icelandic Coast Guard ("ICG") vessel on a routine training mission and patrol.⁴⁹ The helicopter had been in flight for approximately one minute when it crashed into the ocean.⁵⁰ Admiralty jurisdiction existed because the helicopter was manufactured for the ICG to be used in marine rescue and other maritime operations, and the helicopter was specially equipped with an emergency flotation system for ocean landings.⁵¹

In *Flying Boat, Inc. v. Alberto*, a seaplane crashed during takeoff when the nose pitched up and then crashed back down in the navigable waters of Key West Harbor in an area of commercial fishing traffic.⁵² Admiralty jurisdiction existed because the wrong associated with improper installation, maintenance and use of a marine bilge pump on a commercial seaplane arises from an activity having a substantial relationship to traditional maritime activity.⁵³

C. CATEGORY 3: TRANSOCEANIC OR ISLAND VOYAGES (THE "BUT FOR" TEST)

These cases involve transoceanic or island voyages where, but for the advent of air transportation, the only way to reach these destinations would be by sea. The third category is analogous to the *Executive Jet* dictum of a transoceanic flight from New York to London.

In *Roberts v. United States*, a Flying Tiger Lines cargo plane crashed in navigable waters 1500 to 1900 feet short of the run-

⁴⁵ 440 F. Supp. 828, 832 (D.C.V.I. 1977).

⁴⁶ *Id.* at 831.

⁴⁷ *Id.* at 840.

⁴⁸ *Id.* at 841.

⁴⁹ 722 F. Supp. 942, 944 (D. Conn. 1989).

⁵⁰ *Id.*

⁵¹ *Id.* at 946.

⁵² 723 So. 2d 866, 867 (4th Dist. Ct. App. Fla. 1998).

⁵³ *Id.* at 868.

way at Naha Air Base in Okinawa, Japan.⁵⁴ The flight was carrying cargo from Los Angeles.⁵⁵ Admiralty jurisdiction applied because geographic realities make the transoceanic transportation of cargo an activity which is readily analogized to traditional maritime activity.⁵⁶ The crash in navigable waters thus was not merely "fortuitous."⁵⁷

In *American Home Assurance Co. v. United States*, an airplane crashed en route from Atlantic City, New Jersey to Block Island, New York.⁵⁸ The airplane disappeared in the Atlantic Ocean.⁵⁹ The district court held that Admiralty jurisdiction *did not* exist because *Executive Jet* reserved judgment on the question of whether an aviation tort can ever, under any circumstances, bear a significant relationship to traditional maritime activity, and the court doubted whether airplane accidents are proper subjects of admiralty suits.⁶⁰ This case is quite an anomaly because prior to the advent of travel by air, the only way to reach Block Island would have been by sea.⁶¹ However, the court held that the fact that Block Island was separated from the mainland was not sufficient alone to distinguish the case from *Executive Jet*.⁶²

In *Hammill v. Olympic Airways*, an Olympic Airways commercial flight from Korfu Island to Athens, Greece crashed in Voula Bay within one mile of land on approach to Athens airport.⁶³ Admiralty jurisdiction existed because the airplane was on a flight across the Mediterranean Sea and was serving a function that had traditionally been carried on by surface going maritime vessels.⁶⁴

In *Williams v. U.S.*, a DC-3 was lost and presumed crashed while on a flight from California to Hawaii.⁶⁵ Admiralty jurisdiction existed because transoceanic flight fulfills a function that was traditionally performed by waterborne vessels.⁶⁶ The DC-3's

⁵⁴ 498 F.2d 520, 522 (9th Cir. 1974).

⁵⁵ *Id.* at 524.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 389 F. Supp. 657, 658 (E.D. Md. 1975).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 398 F. Supp. 829, 830-31 (D.C. Cir. 1975).

⁶⁴ *Id.* at 834.

⁶⁵ 711 F.2d 893, 894 (9th Cir. 1984).

⁶⁶ *Id.* at 896.

contact with the waters of the Pacific Ocean was not merely fortuitous.⁶⁷

In *Miller v. United States*, a plane crashed in international waters forty miles southeast of West Palm Beach.⁶⁸ The flight had departed Freeport, Bahamas and was bound for Palm Beach, Florida International Airport.⁶⁹ Admiralty jurisdiction existed because the aircraft was performing a function traditionally performed by waterborne vessels.⁷⁰

In *re Air Disaster near Honolulu, Hawaii* involved a mid-air accident of United Airlines Flight 881.⁷¹ The flight left Honolulu International for Auckland, New Zealand.⁷² Eighty-five (85) miles south of Honolulu, the forward cargo door separated from the aircraft.⁷³ Nine passengers were sucked out of the airplane and lost at sea.⁷⁴ Admiralty jurisdiction existed because transoceanic transportation of passengers by air is a function traditionally performed by waterborne vessels.⁷⁵

In *Preston v. Frantz*, a helicopter crashed en route from Connecticut to Nantucket Island.⁷⁶ Admiralty jurisdiction existed because travel from the mainland to Nantucket Island would, of necessity, have to be accomplished by ship but for the introduction of air travel.⁷⁷

D. CATEGORY 4: "FORTUITOUS" AVIATION ACCIDENTS IN TERRITORIAL WATERS

These cases involve fact patterns where water and air travel are not the exclusive means of access. In a majority of these cases the courts find that a significant relationship to maritime activity does not exist.

In *Teachey v. United States*, the United States Coast Guard conducted a helicopter rescue operation of a sinking shrimp boat in the Gulf of Mexico.⁷⁸ After recovery, the helicopter landed

⁶⁷ *Id.*

⁶⁸ 725 F.2d 1311, 1312 (11th Cir. 1984).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1315.

⁷¹ 792 F. Supp. 1541, 1542 (N.D. Cal. 1990).

⁷² *Id.*

⁷³ *Id.* at 1543.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1543-44; see also *Morgan v. United Air Lines, Inc.*, 750 F. Supp. 1046, 1053 (D. Colo. 1990).

⁷⁶ 11 F.3d 357 (2d Cir. 1993).

⁷⁷ *Id.* at 359.

⁷⁸ 363 F. Supp. 1197, 1198 (M.D. Fla. 1973).

briefly at Key West, Florida and then departed for St. Petersburg, Florida.⁷⁹ The helicopter crashed just off the coast of St. Petersburg.⁸⁰ Admiralty jurisdiction did not exist because the helicopter did not crash in the performance of an air-sea rescue, but instead while it was traveling from one Coast Guard base to another.⁸¹ The flight was merely land-based aircraft between points within the continental United States.⁸²

In *Overseas National Airways, Inc. v. United States*, an Overseas National Airways jet struck a flock of sea gulls during takeoff.⁸³ The jet was brought to a stop on the runway, but the plane was destroyed by fire.⁸⁴ The court applied *Executive Jet* to hold that state law and not federal law governs aviation tort litigation.⁸⁵

In *City of New York v. Waterfront Airways*, a collision occurred between a Cessna floatplane operating as an air taxi between New Jersey and Wall Street and a New York City Police Department Bell 206A helicopter.⁸⁶ The Cessna crashed into the East River and the Bell crashed into an unoccupied building in Brooklyn.⁸⁷ Admiralty jurisdiction did not exist because water and air travel are not the exclusive means of access (between New Jersey and New York).⁸⁸

In *Brons v. Beech Aircraft Corp.*, a crash occurred approximately 4.5 nautical miles off the coast of Fort Myers, Florida.⁸⁹ The flight was to begin and end in Florida.⁹⁰ Admiralty jurisdiction did not exist because the flight bore no relationship to traditional maritime activity.⁹¹ The trip was related to training and flight instruction, and the location of the accident was totally fortuitous.⁹²

Our hypothetical crash, on a flight from Vancouver to San Diego, probably falls under the fourth category of cases described above. It is likely a court would hold there was no admiralty

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1199.

⁸² *Id.*

⁸³ 766 F.2d 97, 98 (2d Cir. 1985).

⁸⁴ *Id.* at 99.

⁸⁵ *Id.* at 100-01.

⁸⁶ 620 F. Supp. 411, 412 (S.D.N.Y. 1985).

⁸⁷ *Id.*

⁸⁸ *Id.* at 415.

⁸⁹ 627 F. Supp. 230, 231 (S.D. Fla. 1985).

⁹⁰ *Id.*

⁹¹ *Id.* at 233.

⁹² *Id.*

jurisdiction because there was no relationship to traditional maritime activities and the locality of the accident was purely "fortuitous." Unlike the cases involving transoceanic transportation described in category three, in the hypothetical case overland transportation, including roads and highways, provide an alternative to air transportation. Thus, the flight from Vancouver to San Diego is properly analogized to the *Executive Jet* flight from Cleveland, Ohio to White Plains, New York, as both routes can be traveled by means other than air or through navigable waters.

The only reason the flight deviated from its flight plan and flew over the Pacific was because of the problem the crew believed they were encountering with the engine. Thus, the location of the flight at the time of the accident, over navigable waters in the Pacific Ocean, was completely fortuitous and unrelated to the customary manner of transportation.⁹³

Further, the above flight was authorized to dispatch without water survival equipment such as life rafts, and in fact did dispatch without such equipment. Federal Aviation Regulations allow aircraft to travel without this equipment if the flight planned is within fifty miles of the coast.⁹⁴ This is further evidence of the intent of the airline to operate the aircraft over land, not water.

The accident described above is precisely the type of tort case the Supreme Court in *Executive Jet* stated is not subject to maritime jurisdiction. The Supreme Court even went out of its way to provide a hypothetical in a footnote to ensure its point would be understood. It provided the example of a flight from New York City to Miami, Florida, which would "no doubt involve passage over 'the high seas beyond a marine league from the shore of any State.'"⁹⁵ The court stated a case involving tort claims arising from that flight still would not be subject to federal admiralty jurisdiction unless the terms of DOHSA applied.⁹⁶ Our hypothetical flight is conceptually identical to the New York to Florida example given by the Supreme Court. Furthermore, DOHSA will not apply to this accident because it occurred three

⁹³ See *Executive Jet*, 409 U.S. at 273 ("In the situation before us, which is only fortuitously and incidentally connected to navigable waters and which bears no relationship to traditional maritime activity, the [state] courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors.").

⁹⁴ 14 C.F.R. §§ 1.1, 121.339 (2003).

⁹⁵ *Executive Jet*, 409 U.S. at 274 n.26.

⁹⁶ *Id.*

miles off the coast of California. Accordingly, no traditional maritime nexus exists for a flight between Vancouver and San Diego, or for the route assigned to the flight. The accident giving rise to plaintiffs' claims under the circumstances does not bear a "significant relationship to traditional maritime activity."⁹⁷

V. EVEN IF MARITIME JURISDICTION IS PROPERLY INVOKED, YAMAHA AND ITS PROGENY REQUIRE APPLICATION OF STATE LAW TO COMPENSATORY DAMAGES ISSUES

Admiralty jurisdiction does not entail the automatic application of maritime law. Even if admiralty jurisdiction exists under the *Executive Jet* test, the United States Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun* requires the application of state law remedies to wrongful deaths of non-seamen occurring in state or United States territorial waters in a non-DOHSA case.⁹⁸

A. FEDERAL CHOICE OF LAW ANALYSIS MUST CONSIDER THE DOMICILE OF THE DECEDENT

Under the holding of *Yamaha* and its progeny, a court must apply a federal choice-of-law analysis to determine which body of law has the "most significant relationship to the incident and the dominant interest in having its law applied" to the plaintiffs' claims for damages.⁹⁹ The suggestion that plaintiffs are free to select state or maritime remedies when the court's jurisdiction lies in admiralty ignores the competing state and federal interests in having its law apply to a case involving the deaths of non-seamen in state territorial waters.

The question presented in *Yamaha* was: "Does the federal maritime claim for wrongful death recognized in *Morange* supply the exclusive remedy in cases involving the deaths of non-seafarers in territorial waters?"¹⁰⁰ The Supreme Court answered this question in the negative by holding "the damages available for the jet ski death of Natalie Calhoun are properly governed by state law."¹⁰¹ The Supreme Court in *Yamaha* did not allow plain-

⁹⁷ See *id.* at 268.

⁹⁸ 516 U.S. 1999 (1996).

⁹⁹ See *Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338, 346 (3d Cir. 2000).

¹⁰⁰ *Yamaha*, 516 U.S. at 205.

¹⁰¹ *Id.* at 216.

tiffs to elect a state or maritime wrongful death remedy. Rather, the Court determined that state law applied exclusively to the issue of compensatory damages in actions where the district court's jurisdiction lies in admiralty and the death of a non-seaman occurred in territorial waters.¹⁰²

Following the Supreme Court's *Yamaha* decision, the case was remanded for further proceedings to the Eastern District of Pennsylvania on the dual questions of choice of law and liability standards, "reserv[ing] for another day reconciliation of these issues"¹⁰³ In *Calhoun v. Yamaha Motor Corp.*, Judge Pollack addressed the choice of law issues using "depeceage."¹⁰⁴ As to the issue of compensatory damages, the district court applied the law of Pennsylvania (the law of the decedent's domicile) because "[i]t is Pennsylvania that must care for the Calhoun family in their loss and must afford what compensation is appropriate for the estate of Natalie Calhoun."¹⁰⁵ Accordingly, there is a strong presumption that the law of the decedent's domicile will provide the appropriate remedies for death of a non-seaman in territorial waters.

An appeal to the Third Circuit followed the district court's ruling.¹⁰⁶ The Court of Appeals first addressed the threshold question of whether federal or state choice-of-law rules provide the rule of decision with respect to the remedies available in a wrongful death action under general maritime law.¹⁰⁷ The Third Circuit concluded that because the court's jurisdiction lay in admiralty, federal choice-of-law rules applied in wrongful death actions arising from the death of a non-seaman in territorial waters.¹⁰⁸ Applying the choice-of-law principles applicable to admiralty cases, the Third Circuit determined that "through the lens of the depeceage doctrine" the decedent's domicile "has a substantial interest in obtaining compensation for its citizens in order to remedy wrongs that have been committed against

¹⁰² *Id.*

¹⁰³ *Id.* at 216 n.14.

¹⁰⁴ "Depeceage refers to the use of the law of different states to resolve different issues in the same case." *Calhoun*, 216 F.3d at 342 n.7. The use of "depeceage" to address complex choice-of-law issues is not uncommon in air crash litigation, particularly with respect to damages issues. See James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and The Common Law*, 54 LA. L. REV. 1001 (1994).

¹⁰⁵ *Calhoun v. Yamaha Motor Corp.*, 40 F. Supp. 2d 288, 292 (E.D. Pa. 1999).

¹⁰⁶ *Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338 (3d Cir. 2000).

¹⁰⁷ *Id.* at 343.

¹⁰⁸ *Id.* at 343-345.

such individuals.”¹⁰⁹ The Third Circuit thus affirmed the district court’s ruling. The subsequent history of *Yamaha* thus supports the conclusion that the law of the decedent’s domicile should apply to determine the proper measure of compensatory damages in maritime cases involving the death of a non-seaman in territorial waters.

While the decedent’s domicile has a compelling interest in having its law apply when one of its citizens perishes in a plane crash, a federal interest in the application of maritime law does not exist under the circumstances of most accidents. For example, the carrier’s liability often is governed solely by the Warsaw Convention.¹¹⁰ Accordingly, the liability standards applicable to the carrier are rarely determined in accordance with maritime law. Any federal maritime interest is thus pre-empted by an international treaty.¹¹¹

A single state-law remedial framework should apply after the court conducts a careful choice-of-law analysis under principles developed by federal courts exercising maritime jurisdiction. Applying those factors inevitably leads to the conclusion that the law of the state with the most significant interest in having its remedies apply should be given full effect. The decedent’s domicile has the most significant interest in having its remedies apply to the issue of compensatory damages.¹¹²

¹⁰⁹ *Id.* at 347.

¹¹⁰ See *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 160-61 (1999).

¹¹¹ The primary focus of maritime law and jurisdiction is the protection of maritime commerce. Therefore, the prevailing federal interest can be fully vindicated if all operators of vessels on navigable waters are subject to uniform rules of conduct. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982). Even if maritime law is held to apply in a particular case, substantive maritime rules only apply to the defendants not covered by the Warsaw Convention. Accordingly, the a carrier often stands in the unique position that the interest in the protection of maritime commerce must give way to the Warsaw Convention.

¹¹² Other cases involving aviation mass disasters have recognized that the law of the decedent’s domicile has a unique interest in compensation and distribution of recovery. In *re Aircrash Disaster Near Roselawn, Indiana* on October 31, 1994, 926 F. Supp. 736, 744-745 (N.D. Ill.1996); In *re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.*, 720 F. Supp. 1505, 1530 (D. Colo. 1989) *rev’d and remanded on other grounds*, 964 F.2d 1059 (10th Cir. 1992); In *re Air Crash Disaster Near Chicago, Ill.* on May 25, 1979, 480 F. Supp. 1280, 1283 (N.D. Ill. 1979) *aff’d* 644 F.2d 633 (7th Cir. 1981); In *re Air Crash Disaster at Boston, Mass.* July 31, 1973, 415 F. Supp. 206, 210 (D. Mass. 1976). Therefore it is not uncommon that laws of different states will provide the measure of damages to different plaintiffs arising from the same accident. Indeed, this is also the case in domestic flights when some passengers’ damages are governed by the Warsaw Convention. See, e.g., In *re Air Crash at Little Rock Arkansas* on June 1, 1999, 109 F. Supp. 2d 1022,

VI. CONCLUSION

Maritime jurisdiction is properly invoked in aviation cases that involve (1) helicopter transport in oil rig operations, (2) cases involving a sea-plane that crashes in navigable waters, and (3) transoceanic or island voyages. Maritime jurisdiction does not apply to aviation torts where the crash into navigable waters is purely fortuitous. Nonetheless, even if maritime jurisdiction is properly invoked, the federal courts must apply a federal choice of law analysis to the issue of compensatory damages. In cases involving the death of a non-seaman, the law of the decedent's domicile state should apply to the measure of damages for wrongful death and survival actions.

1024 (E.D. Ark. 2000). Commentators also recognize that "[t]he choice of law of the plaintiff's domicile is the most sensible solution to conflicts concerning compensatory damages." John B. Austin, *A General Framework for Analyzing Choice-of-Law Problems in Air Crash Litigation*, 58 J. AIR L. & COMM. 909, 962-63 (1993).

