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ADMIRALTY JURISDICTION RELATED TO MARITIME AVIATION ACCIDENTS

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THE POWER OF FEDERAL COURTS to administer maritime law is derived from the Constitution. Article III, section two declares that "[t]he judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction."[1] Relying upon this Constitutional grant, Congress, in the Judiciary Act of 1789,[2] provided: "[T]he district courts. . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdicition . . . ."[3] The governing language of the constitutional provision and the congressional grant have guided the courts in determining which issues should properly be heard in federal courts. This comment will trace the development of judicial standards governing jurisdiction of admiralty courts and the application of those standards to the aviation industry.

DEVELOPMENT OF ADMIRALTY LAW IN THE UNITED STATES

Admiralty law is a body of rules, concepts and practices that regulate transportation on water.[3] The maritime industry of Europe was sufficiently developed by 1400 to reguire sepa-

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[1] U.S. CONST. art. III § 2, cl. 1.

[2] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (current version at 28 U.S.C. § 1333(1) (1966)).

[3] *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, ch. 1 (2d ed. 1975). This body of rules, concepts and practices is very attractive to plaintiffs. *See infra* notes 205-08 and accompanying text.

rate courts to adjudicate all maritime commercial issues.[4] Bodies of law were soon codified to govern the various seaport industries.[5] England established maritime courts. Later American colonists introduced admiralty courts into the American colonial legal system.[6] After the American Revolution, the Framers of the Constitution established admiralty courts, and Congress granted admiralty jurisdiction to the federal courts. The task of defining the scope and limitations of admiralty jurisdiction ensued.[7]

In the early case of *DeLovio v. Boit*,[8] Mr. Justice Story suggested a liberal Constitutional interpretation of United States admiralty laws in order to be in harmony with the maritime law of European and the Mediterranean nations.[9] Justice Story stated that, under the Constitution, federal admiralty jurisdicton "comprehends all maritime contracts, torts, and injuries. The latter branch (torts and injuries) is necessarily *bounded* by locality; the former [contracts] extends over all contracts (wheresoever they may be made or executed. . .) which relate to the navigation business or commerce of the sea."[10] Thus, Justice Story sets out his own assessment of the necessity for "maritime" locality as a prerequisite for admiralty jurisdiction for maritime torts.[11]

The Supreme Court embraced the "locality alone" standard

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[4] *Id.*

[5] *Id.*

[6] *See generally* 1 E. BENEDICT, BENEDICT ON ADMIRALTY, ch. 6 at 1-18 (7th ed. 1981).

[7] *Id.* at 19-43.

[8] 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (action upon an insurance policy, party alleging it to be maritime contract).

[9] *Id.* at 443.

[10] *Id.* at 444 (emphasis added). Note that this comprehends a "nature of the purpose" test for contracts, as compared to a "locality" test for torts.

[11] Justice Story first expressed this "locality" test in Thomas v. Lane, 23 F. Cas 957 (C.C.D. Me. 1813) (No. 13, 902) when he stated:

> In regard to torts, I have always understood, that the jurisduction of the admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.

Id. at 960.

for cases involving torts in *The Plymouth*[12] where a steamship caught fire and ignited warehouses on an adjoining wharf.[13] Because the entire damage occurred on land, the Court held that admiralty jurisdiction was not cognizable:

> The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.[14]

The Supreme Court's early pronouncement that the scope of admiralty jurisdicition governing maritime torts was to be determined solely by locality has extended to modern time.[15] The "locality test", however, has been criticized.[16] Critics assert that the nation's concern for the business of navigation and shipping, and the need for uniformity in the control and regulation of shipping as an industry, were the original purposes for creating a separate jurisdiction.[17] Coupling these

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[12] 70 U.S. (3 Wall.) 20 (1865).

[13] *Id.*

[14] *Id.* at 36. *The Plymouth* has in effect been overruled by the Extension of Admiralty Jurisdiction Act, ch. 526, 62 Stat. 496 (1948)(current version at 46 U.S.C. § 740 (1970)), to the extent that its holding denied a remedy in admiralty for damage done to land structures by vessels on navigable waters. That Act provides: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1970).

[15] *See* Victory Carries, Inc. v. Law, 404 U.S. 202 (1971)(refusing to extend admiralty jurisdiction to a claim for relief brought by a longshoreman injured on the dock by the stevedore's equipment). For an extensive list of citations restating this principle see *id.* at 205 n.2. Authorities either acknowledging the proper test of admiralty tort jurisdiction as an open question or expressly favoring a maritime nexus requirement in addition to a maritime locality are listed in Note, *Federal Courts—Admiralty Jurisdiction—"Maritime Locality Plus Maritime Nexus" Required to Establish Admiralty Jurisdiction in Aviation, Inc. v. City of Cleveland*, 14 B.C. IND. & COM. L. REV. 1071 (1973).

[16] *See* Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950) [hereinafter cited as Black]. *See generally*, G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, (2d ed. 1975); A. Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQ. L. REV. 1, 42 (1968); 7A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ .325[3][5] (2d ed. 1972) [hereinafter cited as J. MOORE].

[17] *See* Black, *supra* note 16, at 261.

original purposes with the sole Constitutional requirement of an admiralty or maritime nexus, the critics point to the lack of need or reason for entertaining in federal courts suits concerning swimmers or pleasure boat captains.[18] The strict "locality test" has resulted in the admission to federal courts and the application of substantive admiralty law to cases on the basis of clearly fortuitous circumstances.[19] The test also would have resulted in the exclusion of other cases which, based upon the nature of their subject matter, should have been maintained in admiralty.[20] One of the foremost critics of the locality test, Judge Benedict, expressed what has come to be known as his "celebrated doubt"[21] as to the validity of a mechanical application of the "strict locality" standard.[22]

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[18] *See generally* Birdwell & Whitten, *Admiralty Jurisdiction, The Outlook for the Doctrine of Executive Jet*, 1974 DUKE L.J. 757; Black, *supra* note 16; Note, *Admiralty Jurisdiction; Excutive Jet in Historical Perspective*, 34 OHIO ST. L.J. 355 (1973). Professor Moore states: "Distance from navigable waters is, clearly, not the test. We are solely concerned with whether the essential nature of the occurrence is maritime and if it compels the application of the uniform substantive law and far-reaching procedures and remedies that are an inherent part of the admiralty." 7A J. MOORE, *supra* note 16, at 3584.

[19] *See* In re Motor Ship Pac. Carrier, 489 F.2d 152 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974) (holding that an action to recover for damages to a vessel caused in a bridge collision brought against the owner of a store-based paper mill which obstructed navigation by emitting large quantities of smoke was within the jurisdiction of admiralty); St. Hillaire Moye v. Henderson, 496 F.2d 973 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974) (holding that an action by a water skier against the operator of a pleasure craft was within the jurisdiction of admiralty); Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973) (holding that an action by private pleasure boat owners for compensation for damages to their pleasure boats caused by oil spill was within the jurisdiction of admiralty).

[20] *See* 7A J. MOORE, *supra* note 16, ¶ .325[4]. These instances have resulted in both congressional and judicial attempts to reform this area to achieve more equitable results when the cause of action would not meet the locality test. See as an example, McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953), *infra* note 53, where the court noted that recovery under the Jones Act or doctrine of maintenance and cure is not related to the place of injury, but on the relationship of the party to a vessel. *See infra* notes 51-58.

[21] *See infra* note 22. The doubt expressed by Judge Benedict as to the propriety of granting admiralty jurisdiction to situations exclusively on the basis of their occurrence on water is generally cited in literature related to criticism of the strict locality test. It has been retained in all seven editions of Benedict's multi-volume treatise on Admiralty and has come to be known as the "celebrated doubt."

[22] E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY (1850). Judge Benedict first questioned whether marine locality was enough or whether some relationship of the parties to the ship may also be necessary. The judge stated:

The first judicial expression of Judge Benedict's "celebrated doubt" appeared in *Campbell v. H. Hackfeld & Co.*[23] in which the Ninth Circuit challenged the mechanical application of a "strict locality" test.[24] In *Campbell,* the court denied admiralty jurisdiction to a stevedore injured while unloading a ship anchored in navigable waters.[25] The court criticized the holding of *The Plymouth,*[26] and, citing Judge Benedict, stated: "The fundamental principles underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs."[27]

Other courts have steadfastly applied the strict locality test.[28] The Supreme Court, when given an opportunity to rule on the question of the propriety of the "locality alone" standard, found it unnecessary to resolve the issue.[29] In *Atlantic Transport Co. v. Imbrovek,*[30] a stevedore was injured while loading copper on board a vessel. The defendant argued that no maritime relationship was present, and therefore no admi-

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> It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which the Admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen bathing in the sea, should assault, or imprison, or rob another, it has not been held here that the Admiralty would have jurisdiction of the action for the tort.

Id. at 173.

[23] 125 F. 696 (9th Cir. 1903).

[24] *Id.* at 700.

[25] *Id.* at 701. A stevedore is a person employed in loading and unloading vessels. BLACK'S LAW DICTIONARY 1585 (rev. 4th ed. 1968).

[26] 70 U.S. (3 Wall.) 20 (1865). *See supra* notes 12-14 and accompanying text.

[27] 125 F. at 697 (holding that a stevedore's employment is *not* maritime in nature and therefore, *not* subject to admiralty). With modern judicial interpretation, the precise holding of *Campbell,* like the holding in *The Plymouth,* has been overturned by a later action. *See supra* note 14. In *Atlantic Transport Co. v. Imborvek,* 234 U.S. 52 (1914), the Supreme Court held that a stevedore's employment *is* maritime and thus proper for admiralty jurisdiction. *See infra* note 29 and accompanying text.

[28] *See* 7A J. MOORE, *supra* note 16, at ¶ .325[2].

[29] Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914).

[30] *Id.*

ralty jurisdiction existed. The Court disagreed,[31] stating:

> Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the district court, from any point of view, had jurisdiction. . . . If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient.[32]

Drawing strength from the Supreme Court's refusal to expressly reaffirm *The Plymouth*,[33] some courts began to formulate what they perceived to be more appropriate standards. They added the requirement of a maritime activity to the "locality test."[34] In *McGuire v. City of New York*,[35] the Southern District of New York dismissed the libel[36] of an injured swimmer as not within admiralty jurisdicition. McGuire, while swimming at a public beach, sustained hand injuries when he

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[31] *Id.* at 63.

[32] *Id.* at 61-62.

[33] 70 U.S. (3 Wall.) 20. *See supra* notes 12-14 and accompanying text.

[34] *See* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1127 (5th Cir. 1972) (noting that the outer edge of admiralty tort jurisdiction has not been charted with precision and holding that plaintiff's claim for damages for whiplash injuries allegedly sustained in a rear-end automobile collision, which occurred on a floating pontoon at a ferry landing while the plaintiff was waiting to board a ferry, was not properly within the jurisdicition of admiralty because of the lack of substantial connection with maritime activities or interest); Gowdy v. United States, 412 F.2d 525, 528-29 (6th Cir. 1969) (relying on the *Chapman* analysis, *see infra* note 39, and holding that plaintiff's claim for damages resulting from a fall to the ground from a lighthouse located at the end of a breakwater extending into Lake Michigan was not properly within admiralty jurisdiction because it lacked substantial connection with maritime activities); Smith v. Guerrant, 290 F. Supp. 111, 113-114 (S.D. Tex. 1968) (arguing for the uniform adoption of a test entirely dependent on a maritime connection and holding there was not jurisdiction in admiralty where a forklift ran off a wharf in a yacht basin and came to rest on a finger pier, and defendant's crane was engaged to lift the forklight and place it back on the dock, and, while engaged in doing so, the crane's boom collapsed dropping the forklift into the waters of the harbor).

[35] 192 F. Supp. 866 (S.D.N.Y. 1961).

[36] In admiralty, a libel is the equivalent of a complaint. It is the initiatory pleading on the part of the plaintiff or complainant in an admiralty or ecclesiastical cause, corresponding to the declaration, bill, or complaint. BLACK'S LAW DICTIONARY 1060 (4th ed. 1968).

came in contact with a submerged object.[37] Noting that the broadly stated principle of *The Plymouth* has not survived and that libel did not relate to any tort growing out of navigation, the court stated that the proper scope of admiralty jurisdiction should include all matters relating to "the business of the sea and the business conducted on navigable waters."[38] Shortly thereafter, in *Chapman v. City of Grosse Point Farms*,[39] the Sixth Circuit applied similar logic to another swimming situtation. In denying admiralty jurisdiction, the court stated, "it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters."[40]

Both of these courts applied a standard requiring more than locality. *McGuire*, however, held that the maritime relationship was a threshold consideration; the want of a sufficient maritime relationship made a secondary finding of "locality" unnecessary.[41] In *Chapman*, the court made a true "locality plus" analysis, initially making a separate finding as to "locality," before making an inquiry as to "maritime relationship."[42] In the analysis of the *Chapman* case both elements were deemed necessary for the court to grant admiralty jurisdiction with no indication of the priority of one over the other.[43]

Still later, in *Peytavin v. Government Employees Insurance Co.*[44] the Fifth Circuit denied admiralty jurisdiction for a

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[37] 192 F. Supp. at 866.

[38] *Id.* at 871-72.

[39] 385 F.2d 962 (6th Cir. 1967) (holding that a swimmer injured when he dove off a pier into eighteen inches of water could not invoke admiralty jurisdiction in suit against the city for alleged negligence in failing to erect barriers to prevent diving and failing to warn of the shallow water).

[40] *Id.* at 966. The court noted that following *Atlantic Transport* it could be said that some relationship between the alleged wrong and maritime service, navigation or commerce on navigable waters is a condition *sub silentio* to admiralty jurisdiction.

[41] McGuire v. City of N.Y., 192 F. Supp. 866, 871(1961). Note that this would result in a single test to be applied to torts or contracts and is the position urged by Benedict, *see supra* notes 21-22. *See supra* note 35.

[42] Chapman v. City of Grosse Point Farms, 385 F.2d 962, 965 (1967). *See supra* note 39.

[43] *Id.* at 966. Note that this position relies on the question left unanswered in *Atlantic, see supra* note 39.

[44] 453 F.2d 1121 (5th Cir. 1972). *See supra* note 34.

case involving whiplash injuries that occurred on a ferryboat landing.[45] The court reasoned that federal court admiralty jurisdiction was based upon the need for uniform law governing maritime industries. Thus, if there were no maritime activity or interest, maritime jurisdiction would not be sustained.[46]

Courts continued to struggle with the rule in *The Plymouth*[47] and made painstaking efforts to justify the application of admiralty law to the fact situation.[48] In addition, the Supreme Court passed up another opportunity to reassess its position in *Victory Carriers, Inc. v. Law*[49] by denying admiralty jurisdiction to a stevedore injured on a dock, stating: "The historical view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on navigable water of the United States."[50] Thus, the Court left the rule in *The Plymouth* firmly intact.

Congressional and judicial reaction to the application of the strict locality test resulted in a number of statutes and concepts allowing admiralty jurisdiction when there was clearly a traditional maritime relationship but when the locality of the tort was not exclusively in navigable water. An illustration of this pragmatic judicial utilization of admiralty concepts was the granting of "maintenance and cure" to seamen regardless of whether their illness or injury first manifested itself or occurred upon land rather than upon navigable waters.[51] The

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[45] *Id.* at 1122.

[46] *Id.* at 1127.

[47] The Plymouth, 70 U.S. (3 Wall.) 20 (1866). *See supra* note 12 and accompanying text.

[48] *See, e.g.*, Davis v. City of Jacksonville Beach, Fla., 251 F. Supp. 327 (M.D. Fla. 1965) (holding that injury to a swimmer caused by a surfboard was within admiralty jurisdiction based upon the conjecture that a surfboard posed a potential threat to maritime trade or commerce).

[49] 404 U.S. 202 (1971). *See supra* note 15.

[50] *Id.* at 205.

[51] *See* O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). Benefitting from the doctrine of maintenance and cure, a seaman can often obtain needed board, lodging and medical care while his action for pain, suffering and lost wages is pending against his employer. In no other area of the law is this true. Railroad workers may sue their employers but they may not receive interim compensation. Employees within the scope of a state worker's compensation statute or the Longshoremen and Harbor Workers Compensation Act are furnished with a compensation award but

concept of "maintenance and cure" evolved from historical admiralty law, and benefits a seaman injured or stricken with illness at a time during a period of maritime employment. The Jones Act,[52] enacted by Congress, was interpreted by the courts as extending to seaman or their personal representatives a tort cause of action enforceable, in admiralty, at the plaintiff's election regardless of the place of the injury.[53]

The concept of "seaworthiness" is another ancient admiralty doctrine by which a seaman could recover damages from the vessel owner for personal injuries sustained as a result of the unseaworthiness of a vessel. This cause of action has been made available to a longshoreman injured on shore from the alleged "unseaworthiness" of a vessel's gear.[54] The doctrine has since been extended to include damages caused by the cargo as well as the vessel and its appurtenances.[55]

The Extension of Admiralty Jurisdiction Act[56] was enacted to prevent inequities such as those manifest in *The Plymouth*.[57] The Act provides admiralty jurisdiction for all cases of damage or injury caused by a vessel on water not withstanding that the damage be done on land. In 1972, Congress amended the Longshoremens and Harbor Workers Compensation Act[58] and broadened its scope to include injuries incurred

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are normally precluded from suing their employers. Only the seaman has both remedies available. *See generally* 7A J. MOORE, note 16 *supra*, at ¶ .325[4].

[52] 46 U.S.C. § 688 (1970).

[53] *See* McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953). The court stated:

> The right of recovery under the Jones Act, as in the case of maintenance and cure, depends not on the place where the injury is inflicted, this being wholly immaterial, but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.

Id. at 134.

[54] *See* Strike v. Netherland Ministry of Traffic, 185 F.2d 555, 558 (1950). *See also* Dixon v. The Cyrus, F. Cas. 755 (D. Pa. 1789) (No. 3930). In *Dixon* the court held that the unseaworthiness of a vessel gives a seaman the privilege of leaving the vessel without incurring penalties for desertion and without forfeiting wages. *Id.* at 757.

[55] *See* Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963) (longshoreman employed to unload a ship entitled to admiralty law for his injuries sustained when he slipped on loose beans which leaked from defective bags, a part of the cargo).

[56] 46 U.S.C. § 740 (1970). *See supra* note 14.

[57] *See* 7A J. MOORE *supra* note 16 at ¶ .325[4].

[58] 33 U.S.C. §§ 901-950 (1976). The strict situs oriented test was modified by the 1972 amendments to the Act which broadened the definition of "navigable waters of

on land related to maritime activity.

AVIATION AND ADMIRALTY

In the early era of aviation, suits involving crashes above the high seas were heard in admiralty courts with their jurisdiction based upon the locality test.[59] As more and more states enacted wrongful death statutes, and interpreted them broadly enough to apply to occurrences within the states' territorial waters, Congress sought to provide a comparable remedy to the representatives of persons dying on the high seas as a result of the wrongful acts of others.[60] In 1920, Congress enacted the Death on the High Seas Act (DOHSA)[61] which provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty.[62]

The Death on the High Seas Act was interpreted by the courts to apply to aviation accidents occurring beyond state territorial waters.[63] The rationale was based on two considera-

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the United States" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." *Id.* at § 903(a).

[59] *See* The Crawford Bros. No. 2, 215 F. 269 (W.D. Wash. 1914). Early aviation cases indicate that the federal courts had trouble characterizing the new flying machines as instruments cognizable in admiralty. In *Crawford*, the court held that the action lacked admiralty standards because airplanes "are neither of the land nor sea, and not being of the sea or restricted in their activities to navigable waters, they are not maritime." *Id.* at 271. But compare Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921), where the court granted admiralty jurisdiction in a case involving a seaplane accident. The court tentatively held: "We think the craft, though new, is subject, *while afloat*, to the tribunals of the sea." 133 N.E. at 372 (emphasis added).

[60] *See generally* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT, ch. 1 (2d ed. 1969); 7A J. MOORE, *supra* note 16, at ¶ .330[2].

[61] 46 U.S.C. §§ 761-68 (1976).

[62] *Id.* at § 761.

[63] *See* 7A J. MOORE, *supra* note 16, at ¶ .330[2].

tions; first, the locality test,[64] and second, the statutory interpretation of the law.[65] Admiralty jurisdiction for wrongful deaths arising from crashes of land-based aircraft occurring over the high seas beyond one marine league from shore is now firmly established.[66]

For an aircraft accident occurring within the territorial waters of a state DOHSA is not expressly applicable. However, in *Weinstein v. Eastern Airlines, Inc.*,[67] a plane crashed into Boston Harbor shortly after takeoff, clearly within the territorial waters of the state. The Third Circuit granted admiralty jurisdiction to the tort claims resulting from the crash, reasoning that if a tort claim arising from an aircraft accident beyond one league from shore is within the maritime jurisdiction of the court, then a tort claim arising from a crash within one league from shore must be within the maritime jurisdiction as well.[68] While the court cited *Atlantic Transport Co. v. Imbrovek*[69] as having rejected the requirement that the tort must have some connection with a vessel, it nonetheless noted that "locality plus" was also present by way of a proper maritime connection.[70]

EXECUTIVE JET: A NEW STANDARD IS ANNOUNCED

The preceding cases illustrate the judicial treatment given aviation accidents in the lower federal courts at the time the

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[64] Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954) (holding that admiralty jurisdiction is dependent upon the locality where the tort occurred). Choy v. Pan American Airways Company, 1941 AMC 483 (S.D.N.Y. 1941) (the crash of a land-based airplane into navigable waters gives rise to a cause of action enforceable with the admiralty jurisdiction).

[65] D'Aleman v. Pan-American World Airways, 259 F.2d 493 (2d Cir. 1958). Interpreting the statute, the court held that "on the high seas" could be capable of extension to apply to "under" and "over" the high seas. *Id.* at 495.

[66] *See 46 U.S.C. § 761 (1976); 7A* J. MOORE, *supra* note 16, ¶ .330[2].

[67] 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[68] *Id.* at 763. The court analogized this set of facts to the DOHSA reasoning.

[69] 234 U.S. 52 (1914). *See supra* notes 29-32 and accompanying text.

[70] 316 F.2d 758 (3d Cir. 1963). By way of a proper maritime connection, the court stated: "[w]hen an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." *Id.* at 763.

Supreme Court granted certiorari of *Executive Jet Aviation Inc. v. City of Cleveland*[71] in the fall of 1972. Some courts steadfastly applied *The Plymouth*[72] strict locality rule as the standard of admiralty jurisdiction for all torts. Other courts accepted the *McGuire v. City of New York*[73] analysis and held that "locality" was a limitation of the determinative factor of maritime nexus; without a maritime nexus, a finding on locality was unnecessary. Still other courts adopted the *Chapman v. City of Grosse Point Farms*[74] analysis which required a finding of both locality and maritime nexus before granting jurisdiction. Finally, courts often applied their own ad hoc standards.

In *Executive Jet*,[75] a case remarkably like *Weinstein*,[76] an airplane ingested seagulls into its engines while attempting takeoff. The plane had been cleared for takeoff, but lost power before becoming totally airborne, hit an airport perimeter fence and a parked truck and came to rest in Lake Erie, one fifth of a mile from shore.[77] The aircraft owners asserted admiralty jurisdiction to sue the air traffic controller, the City of Cleveland as owner and operator of the airport and the airport manager.[78]

The judicial treatment of *Executive Jet* is illustrative of the variety of analysis historically applied to maritime torts. The district court followed a *Chapman*[79] analysis and denied admiralty jurisdiction, finding that the situs of the tort was on land and that the wrong bore no relationship to maritime matters.[80] The separate findings on both issues, "locality" and

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[71] 409 U.S. 249 (1972).

[72] 70 U.S. (3 Wall.) 20 (1866). *See supra* notes 12-14 and accompanying text.

[73] 192 F. Supp. 866 (S.D.N.Y. 1961). *See supra* note 35 and accompanying text.

[74] 385 F.2d 962 (6th Cir. 1967). *See supra* note 39 and accompanying text.

[75] 409 U.S. 249 (1972).

[76] Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963). *See supra* note 67 and accompanying text.

[77] 409 U.S. at 251.

[78] *Id.*

[79] 385 F.2d 962 (6th Cir. 1967). *See supra* note 38 and accompanying text.

[80] 409 U.S. at 251. The Supreme Court, quoting the district court, went on to say, "Assuming. . .that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of commerce." *Id.*

"maritime relation" indicate that the court applied a two-pronged standard. On appeal, however, the Sixth Circuit ignored "maritime relation" and affirmed the denial of jurisdiction based on the lack of "locality."[81]

Noting the seemingly important question affecting jurisdiction, the Supreme Court began its analysis of *Executive Jet* by tracing the development of "locality" as the sole requirement for admiralty jurisdiction.[82] The Court noted that the test was established and developed "in an era when it was difficult to conceive of a tortious act on navigable waters other than in connection with a waterborne vessel."[83] The Court noted that the test had served well the needs of commerce when applied to "traditional types of maritime torts."[84]

After quoting the extensive list of critics of "locality" the Court stated that it never had held explicitly that a maritime locality was the sole test.[85] Following its historical discourse, the Court announced that locality alone would not be a sufficient basis for admiralty jurisdiction in aviation tort accidents.[86] The Court stated that:

> It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the

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[81] *Id.* at 252. The Supreme Court noted that the appeals court found it unnecessary to consider the question of maritime relationship or nexus which the Sixth Circuit had discussed earlier in *Chapman Id.*.

[82] *Id.* at 253-54.

[83] *Id.* at 254.

[84] *Id.* The Court, quoting a leading admiralty text, stated:

> It should be stressed that the important cases in admiralty are *not* the borderline cases on jurisdiction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra.

G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 24 n. 88 (1957).

[85] 409 U.S. at 258. *See supra* notes 29-32.

[86] *Id.* at 261. "[W]e conclude that the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a 'maritime tort'." *Id.* at 268.

contrary.[87]

The Court, however, failed to spell out exactly what would constitute a traditional maritime activity. An example of a situation clearly lacking the appropriate maritime relationship was stated, that of an event befalling a land based plane flying from one point in the continental United States to another. [88] Thus, the Court made it possible to deduce from its analysis the factors that the Court considered relevant. The Court cited the degree of similarity between problems posed for the downed planes and the problems posed for sinking ships, the qualities and traditions of planes and ships, the traditional and appropriate remedies available to the participants, and the probable cause of the injuries sustained.[89] These apparently are the factors the lower court should consider in determining whether a maritime relationship exists.

The Court expressly refused to exclude aircraft from admiralty jurisdiction.[90] Noting that there was no need to decide whether an aviation tort could, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction in the absence of legislation, the court hypothesized a possible scenario:

> It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels.[91]

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[87] *Id.*

[88] *Id.* at 271.

[89] *Id.* at 264-72.

[90] *Id.* at 271.

[91] *Id.* With regard to such a situation, the court stated:

> Were the maritime law not applicable, it is argued that the recovery would depend upon a confusing consideration of what substantive law to apply, *i.e.*, the law of the forum, the law of the place where each decedent purchased his ticket, the law of the place where the plane took off, or perhaps the law of the point of destination.

Id. at 272 n.23 (quoting 7A J. MOORE, FEDERAL PRACTICE ¶.330[5], (2d. ed. 1972)).

The Court affirmed the dismissal of the complaint after finding that there was no maritime nexus in the case.[92]

THE LOWER COURTS INTERPRET EXECUTIVE JET

Following the *Executive Jet* decision, a flurry of commentators analyzed its impact on the law of admiralty jurisdiction.[93] The general consensus was that locality, as a sole factor, was no longer the standard in aviation torts; however, there was little agreement on precisely what the new standard was. Some writers perceived *Executive Jet* as requiring a "locality plus" standard,[94] while other authors focused on the phrase "significant relationship to traditional maritime activity" and attempted to phrase new standards.[95]

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[92] *Id.* at 274. The Court noted that it perceived a need for aviation tort cases to be governed by uniform substantive and procedural laws, and to be heard in federal courts to assure uniformity, but observed that it was not for the Court to assume this task. The Court added: "If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce." *Id.*

[93] *See* Birdwell & Whitten, *Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet*, 1974 DUKE L.J. 757; Mosley, *Did That Airplane Affect Admiralty; Executive Jet and its Aftermath*, 25 FED. INS. COUN. Q. 319 (1975); Note, *Federal Courts—Admiralty Jurisdiction—"Maritime Locality Plus Maritime Nexus" Required to Establish Admiralty Jurisdiction in Aviation Negligence Cases—Executive Jet Aviation, Inc. v. City of Cleveland*, 14 B.C. IND. & COM. L. REV. 1071 (1973); Note, *Elaborate Casuistry: Admiralty Jurisdiction After Executive Jet*, 34 FED. BUS. J. 157 (1975); Note, *Hops, Skips and Jumps Into Admiralty Revisited*, 39 J. AIR L. & COMM. 625 (1973); Note, *Admiralty Jurisdiction—The Airplane Crash—A Further Exception to the Strict Locality Rule*, 25 MERCER L. REV. 927 (1974); Note, *Admiralty Jurisdiction: Executive Jet in Historical Perspective*, 34 OHIO ST. L.J. 355 (1973).

[94] *See generally id.*

[95] *See generally* Birdwell & Whitten, *Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet*, 1974 DUKE L.J. 757, 773. The authors list four possible rules which could be applied following *Executive Jet:*

> (1) The old locality rule prevails as always except in specifically excepted areas, such as aircraft accidents.
>
> (2) The old locality rule prevails as always except in the specifically exempted areas and in cases sufficiently similar to exempted areas, *e.g.* aircraft accidents arising in intracontinental flights, and not satisfactorily capable of resolution by the mechanical operation of the traditional locality rule.
>
> (3) The locality test has been flatly rejected, leaving the finding of sufficient maritime nexus as the only relevant criterion for admiralty jurisdiction.

The federal district courts were soon called upon to interpret and apply the *Executive Jet* standard. In *Teachey v. United States*,[96] a Coast Guard helicopter rescued plaintiff's decedent from a sinking shrimp boat in the Gulf of Mexico. In the course of events the helicopter crashed on land and the rescued fisherman died of injuries resulting from the crash.[97] Both parties cited *Executive Jet* as support for the assertion of, or lack of, admiralty jurisdiction. The plaintiff relied on the maritime nature of a search and rescue, a function traditionally performed by vessels. Although the court suggested that the plaintiff's argument was sound, it held that the helicopter had completed its traditional maritime function when it crashed.[98] The court noted that, at the time of the accident, the helicopter was merely transporting passengers between points within the continental United States; once the helicopter landed to refuel, the traditional maritime function ceased.[99] The *Teachey* court also discussed the portion of the *Executive Jet* decision dealing with the probable causes of the injury.[100] The Florida court noted that the alleged interruption of the helicopter flight (the refueling) was caused by "cir-

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(4) The test demands a finding of *both* locality and a maritime nexus, the failure to find either being capable of defeating the jurisiction.

Id. at 773 (footnotes omitted).

[96] 363 F. Supp. 1197 (M.D. Fla. 1973).

[97] *Id.* at 1198. After the rescue, the helicopter landed at Key West. *Id.* For unknown reasons, the plaintiff's decedent remained on the helicopter when it took off again, and, at take-off, the helicopter crashed. *Id.*

[98] *Id.* at 1199.

[99] *Id.* Until the helicopter was refueled, it was a substitute for a vessel performing a rescue operation. Once it refueled, the maritime nature of the vehicle ceased and it proceeded on its second leg. *Id.* While the court looked to the function of the helicopter at the time of the accident, the court referred to the traditional maritime function language of *Executive Jet* as "some dicta." *Id.*

[100] *Id.* The *Teachey* court reiterated:

> Although dangers of wind and wave faced by a plane that has crashed on navigable waters may be superficially similar to those encountered by a sinking ship, the plane's unexpected descent will almost invariably have been attributable to a cause unrelated to the sea—be it pilot error, defective design or manufacture of airframe or engine, error of a traffic controller at an airport, or whatever; and the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty.

Id. (quoting *Executive Jet*, 409 U.S. at 270).

cumstances having no relationship to the vagaries of sea travel."[101] Thus, the court appeared to look primarily for a "maritime" cause as the threshold determination for admiralty jurisdiction.

A Louisiana Court had an early opportunity to apply the new *Executive Jet* standard of admiralty jurisdiction in *Higginbotham v. Mobil Oil Corp.*[102] Plaintiffs were representatives of the pilot and three passengers of a helicopter that crashed into the Gulf of Mexico about 100 miles south of Louisiana. The helicopter delivered employees to an offshore rig, took off and then disappeared.[103] The court applied a classic two-pronged "locality plus" analysis. The court first found that the traditional locality test of jurisdiction was satisfied because the accident occurred on the high seas over the outer Continental Shelf, far outside the boundaries of Louisiana.[104] In finding the "plus," a substantial maritime relation, the court stated:

> The fated helicopter was owned and operated by Mobil in conjunction with its extensive offshore activites, and at the time of the fatal accident, *was performing the ordinary functions of a crewboat.* Unquestionably it was engaged in a maritime activity and was not operating as a "land-based aircraft between points within the continental United States." This holding indicates that the court, rather than focusing on a maritime "cause" as the *Teachey* court had done, looked instead for a maritime "function" to satisfy its second prong.[105]

In *Kelly v. Smith,* [106] heard shortly after *Higginbotham,* the

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[101] *Id.* Query whether the outcome of this case would have been the same had the refueling been effected at some offshore island rather then upon the mainland.

[102] 357 F. Supp. 1164 (W.D. La. 1973), *rev'd on other grounds,* 436 U.S. 618 (1978).

[103] *Id.* at 1166.

[104] *Id.* at 1167.

[105] *Id.* (emphasis added) (citing *Executive Jet,* 409 U.S. at 270). *Higginbotham* was eventually appealed to the United States Supreme Court where the jurisdictional issue was mentioned in a footnote. 436 U.S. at 619 n.2 (1978). The Court observed: "The District Court bottomed admiralty jurisdiction on a finding that the helicopter was the functional equivalent of a crewboat. The ruling has not been challenged in this Court." 436 U.S. at 619 n.2. One could assume that the acceptance of jurisdiction by the Supreme Court was a tacit approval of the lower court's grant of jurisdiction.

[106] 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974).

Fifth Circuit adopted its own jurisdictional test, which was to be applied after consideration of all the circumstances. The *Kelly* case presents a most unlikely scenario for inclusion in a discussion of admiralty and while not involving aircraft, the case is helpful in that the court draws on *Executive Jet* to establish its jurisdictional standard. The *Kelly* court held that deer poachers fleeing the gun-firing owners of a private reserve in a fifteen foot outboard motor boat on the Mississippi River had a maritime cause of action for their gun-shot wounds.[107] In announcing its test the court said:

> From the facts and analysis of *Executive Jet* . . . we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and the traditional concepts of the role of admiralty law.[108]

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[107] *Id.*

[108] *Id.* at 525. In creating its four element test, the court reasoned:

> The party most seriously injured was the pilot, the person responsible for the safe navigation of the river. The vehicle involved was a boat, not an automobile or airplane, whose function was transportation across navigable waters, a traditional role of watercraft.
>
> The other instrumentalities involved—firearms—and the injuries they caused, are not so inherently indigenous to land as to preclude any maritime connection. Additionally, upholding admiralty jurisdiction does not stretch or distort long evolved principles of maritime law. Admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters.
>
> Policy militates toward admiralty jurisdiction in this case. The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation. Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct. Regardless of whether the plaintiffs had available remedies in state courts, the federal interest in protecting navigation on the Mississippi River overrides any considerations of federal-state comity or conflicts of interest.

Id. at 535-36. See Motor Ship Pacific Carrier Union Camp Corp. v. Gypsum Carrier, Inc., 489 F.2d 152, 156 (5th Cir.), *cert. denied*, 417 U.S. 931 (1974), in which the Fifth Circuit, relying on *Kelly*, held that an action to recover for damages to a vessel caused in a bridge collision brought against the owner of a shore-based paper mill obstructing navigation by emitting large quantities of smoke was also within the jurisdiction of the admiralty.

The *Kelly* test has endured in the Fifth Circuit as an aid to determining whether torts occurring upon navigable waters have a sufficient maritime connection to bring them within the admiralty jurisdiction.

In 1974, the District Court of Vermont, in *Miller v. Cousins Properties, Inc.*,[109] applied *Executive Jet* to deny admiralty jurisdiction to an aviation accident. Plaintiff, the administrator of the deceased passenger's estate sued for wrongful death resulting from the crash of defendant's airplane.[110] The court looked solely to the function of the plane at the time of the accident, characterizing it as being similar to the situation the Supreme Court had hypothesized in *Executive Jet*.[111] The plane had taken off from Burlington, Vermont enroute to Providence, Rhode Island and, shortly after takeoff, crashed over the waters of Lake Champlain.[112] The court quoted Justice Stewart in *Executive Jet*. "[T]here is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States."[113] The court recited the *Executive Jet* holding that, absent a contrary statutory provision, admiralty jurisdiction resides only where there is a significant relationship to traditional maritime activity.[114] Because the court ignored locality and totally relied on Justice Stewart's statement in *Executive Jet*, one can infer that the court chose to eliminate locality as an element of admiralty jurisdiction in aviation accidents.

A year later, in *Roberts v. United States*, [115] the Ninth Circuit held that *Executive Jet* created a new two-fold test for admiralty jurisdicition. In *Roberts*, a cargo plane was approaching the Okinawa United States Air Base when it crashed into navigable waters 2,000 feet short of the run-

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[109] 378 F. Supp. 711 (D. Vt. 1974).

[110] *Id.* at 712. Plaintiff sued the owner, manufacturer and maintenance personnel.

[111] *Id.* at 715.

[112] *Id.* at 712.

[113] *Id.* at 715 (quoting Executive Jet v. City of Cleveland, 409 U.S. 249, 274 (1972)).

[114] *Id.*

[115] 498 F.2d 520 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1975).

way.[116] After amending the complaint to assert admiralty jurisdiction, the plaintiffs alleged that the accident had occured while the aircraft was making an approach to land but was over the high seas, and that the plane had crashed into navigable waters.[117] The district court concluded that it had jurisdiction to entertain the appellee's suit as a maritime wrongful death action under the Federal Tort Claims Act (FTCA).[118] The appellate court cited *Executive Jet* as having announced a new two-fold test, retaining the navigable waters locality prerequisite, but adding a "maritime nexus" requirement.[119] Claiming that the Supreme Court had not closed the admiralty door to all aviation accidents,[120] the court said, "the Supreme Court . . . expressly reserved the question which is before us now."[121] The court distinguished the fact situation before it from that of *Executive Jet*, stating that "since the plane was traveling from Los Angeles to Viet Nam, 'geographic realities . . . do not make the cargo plane's contact with navigable waters entirely 'fortuitous'; and '*more significantly*, the transoceanic transportation of cargo is an activity which is readily analogized with traditional maritme activity.' "[122] The court held that *Executive Jet* did not preclude a maritime action on the facts, but held that the Statute of

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[116] *Id.* at 522. The plaintiffs brought their original complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80 (1976). This Act makes the United States liable under the local law of the place where the tort occurs for the negligent or wrongful acts or omissions of federal employees within the scope of their employment in the same manner and to the same extent as a private individual under like circumstances. *See* PROSSER, LAW OF TORTS 972 (4th ed. 1971). The United States gained a dismissal arguing that because the tort was alleged to have occurred in Okinawa the action was barred by section 2680(k) of the FTCA. Section 2680(k) of the FTCA excludes "any claim arising in a foreign country." In dismissing the suit, the District Court granted leave to amend. 498 F.2d at 522.

[117] 498 F.2d at 522. Plaintiff charged the Air Force personnel with negligence in directing the landing and the subsequent rescue operation and filed suit in a wrongful death action. *Id.*

[118] *Id.*

[119] *Id.* at 523.

[120] *Id. See supra* note 90.

[121] *Id.* at 524.

[122] *Id.* (emphasis added). The court noted that before the advent of aviation such shipping could only be performed by waterborne vessels. *Id.*

Limitations in the Suits in Admiralty Act barred the action.[123]

The Ninth Circuit was soon given another opportunity to encounter the *Executive Jet* standard in *T. J. Falgout Boats, Inc. v. United States*.[124] The *Pacific Seal*, a 299 gross ton ship owned by Falgout Boats, Inc., while operating in navigable waters off the California coast, was struck by a Sidewinder missile released from a U.S. Navy airplane.[125] The plaintiffs complained of negligence on the part of the pilot and sued for damages to their vessel, claiming an aviation tort and admiralty jurisdicition.[126] The court repeated the *Executive Jet* rationale explained in *Roberts* and stated that the Supreme Court had annexed to the "locality rule" a requirement that the facts of the occurrence show "a significant relationship to traditional maritime activity."[127] Further, the court stated that its problem was "to decide whether the circumstances under which appellant's damages occurred bear a significant relationship to traditional maritime activity."[128] To determine whether a significant relationship to traditional maritime activity was present, the court applied the test announced by the Fifth Circuit in *Kelly*[129] which takes into consideration

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[123] *Id.* at 526-27. The court referred to the Suits in Admiralty Act (SIA) § 5, 46 U.S.C. §§ 741-52 (1975) and noted that an amendment to section 742 in 1960 had been interpreted by the courts as a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA, the court found that the claim could be brought under this amendment, because the limitations period in the SIA is jurisdictional in nature. *Id.* The Court stated:

> The two year time-bar of the Suits in Admiralty Act is unlike a time-bar period prescribed under an ordinary Statute of Limitations. Under an ordinary time-bar statute, a claim is not extinguished after the statutory period has elapsed. It is only unenforceable. The time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable, but extinguishes the claim itself, for when the sovereign, immune from suit, consented to be sued, it was made a condition of the right to sue that suits so authorized had to be brought within the time-bar period.

Id. at 526 (quoting States Marine Corp. of Del. v. United States, 283 F.2d 776 (2d Cir. 1960)).

[124] 508 F.2d 855 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

[125] 508 F.2d at 856.

[126] *Id.*

[127] *Id.* at 856-57.

[128] *Id.* at 857.

[129] Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974),

the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and the type of injury, and the traditional concepts of the role of admiralty law.[130]

Upon application of the *Kelly* test, the Ninth Circuit found that the Navy plane was maritime in nature[131] unlike the aircraft in *Executive Jet*. The court noted that the release of the Sidewinder from the plane over navigable waters unquestionably created a potential hazard to navigation.[132] The *Falgout* court reasoned that the finding of a significant relationship to traditional maritime activity rendered this case clearly distinguishable from *Executive Jet*, and therefore *Executive Jet* did not control the outcome of this case.[133]

A Pennsylvania district court had the opportunity to consider what could be described as one of the "perverse and casuistic borderline situations"[134] that was troublesome to the majority in *Executive Jet*. In *American Home Assurance Co. v. United States*[135] a plane crashed while en route from Atlantic City, New Jersey, to Block Island, New York, an island only accessible by air or sea. No part of the wreckage was found. Plaintiffs contended that the crash was caused by the defendant's failure to advise the pilot of poor weather conditions and based their claim in admiralty.[136]

The court addressed plaintiff's contention that this situa-

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discussed supra at notes 105-07 and accompanying text.

[130] 508 F.2d at 857.

[131] *Id.* The court explained:

> The United States Navy exists, in major part, for the purpose of operating vessels and aircraft in, on, and over navigable waters. Its aviation branch is fully integrated with the naval service and, whether land-based or sea-based, functions essentially to serve in sea operations. Surely, it cannot be said that the naval plane's activity over water in the instant case was entirely 'fortuitous' as was the plane involved in *Executive Jet*.

Id. Query whether the outcome of this case would have been the same had the offending plane been one of the United States Army.

[132] *Id.*

[133] *Id.* However, this suit was time-barred as in *Roberts*, because it could only be maintained according to the Suits in Admiralty Act. *See supra* note 123.

[134] Executive Jet v. City of Cleveland, 409 U.S. 249, 255 (1972).

[135] 389 F. Supp. 657 (M.D. Pa. 1975).

[136] *Id.* at 658.

tion was similar to the example provided by the Supreme Court in *Executive Jet* as a possible instance in which a "traditional maritime activity"[137] might be found.[138] The *American Home* court noted that this example followed a sentence in the *Executive Jet* holding in which the Supreme Court reserved judgment on the question of whether an aviation tort *can ever, under any circumstances,* bear a sufficient relationship to traditional maritime activity so as to be cognizable in admiralty.[139] The district court chose to construe that language narrowly and held that the fact that Block Island was separated from the mainland was not sufficient alone to distinguish this case from *Executive Jet* and support a finding that it may be brought in admiralty.[140]

The court dismissed "locality" as an issue and considered only the question of traditional maritime activity. Plaintiffs asserted that weather problems, the alleged cause of the accident, were traditional factors with which navigators and seamen were concerned. The plaintiffs asserted that the case was one in admiralty because weather problems were the focus of their suit.[141] The court was not sympathetic to this logic, stating that weather is a general concern rather than a specific maritime worry.[142]. The court dismissed the action because it found that the locality was insufficient and the nexus requirements were lacking.[143] The analysis of the *American Home* court indicates that it read *Executive Jet* as holding that the Supreme Court had serious doubt about whether airplane accidents are appropriate subjects of admiralty suits.

The District Court of the Virgin Islands, after placing the "silver oar of admiralty"[144] on the bench, took a different ap-

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[137] *Id.* (quoting Executive Jet v. City of Cleveland, 409 U.S. 249, 261 (1972))(the example being of a plane flying from New York to London which crashes in the mid-Atlantic).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 657.

[142] *Id.* at 658.

[143] *Id.*

[144] 355 F. Supp. 683, 684. The court noted:

When the English Admiralty was finally merged into the Supreme

proach in *Hark v. Antilles Airboats, Inc.* [145] Plaintiff purchased a ticket for transportation on an amphibian plane from St. Thomas to St. Croix. Seconds after takeoff, but before the plane became completely airborne, engine failure caused the pilot to ditch the plane in the harbor.[146] The plaintiff sued for personal injuries claiming admiralty jurisdiction. The court noted that, since *Executive Jet*, a "maritime connection" test was to be used in addition to the locality test. The factors to be considered were much the same as those used to determine whether the seaplane was in its role as a "vessel" at the time of the accident.[147]

Notwithstanding the role of the seaplane as a vessel, the court stated three independent reasons for asserting admiralty jurisdicition in this fact situation. First, the problems of taking off and landing a seaplane differ from those encountered with conventional aircraft, and are instead influenced by the "marine" nature of the runway used.[148] Secondly, when the flight is over international waters, an admiralty forum is especially convenient.[149] Finally, it seems desirable to treat ship

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> Court of Judicature in England in 1873, it became one of several divisions, to wit, the Probate, Divorce and Admiralty Division. Each Division of the High Court was granted the same jurisdiction so that any judge might hear any case or transfer it to another Division. The result of this led to confusion when the Judge switched from, say, divorce to admiralty, and this, I am advised, led to the establishment of the custom of placing a "Silver Oar of Admiralty" on or near the bench, indicating to all that drew nigh that his honor was sitting in a matter involving maritime and admiralty jurisdiction. There is such an oar in the District Court of the Virgin Islands, but it is made out of oak and not silver.

Id.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 686 n.2.

[148] The court noted:

> To take one example, on takeoff and landing runs, the plane is subject to the Rules of the Road and any collision would be determined accordingly; the plane may have to turn shortly after takeoff without proper maneuvering speed to avoid large ships anchored in a pattern determined by the harbormaster; the take off or landing waters could also be fraught with flotsam or ligon or just plain pollution and erratic boaters and snorklers—all posing maritime dangers.

Id. at 686.

[149] *Id.* at 687. The court recognized the convenience of applying a nationally-uni-

and aircraft accidents in the same manner, if possible.[150] Despite the court's notation of alternate grounds for establishing admiralty jurisdiction and its policy considerations, the court limited its jurisdictional grant to the facts in this specific event. The court held that an amphibious airplane crash could be grounds for a maritime tort action when the plane had not fully completed the takeoff phase of its flight.[151]

More recently, a Virgin Islands district court assessed the question of admiralty jurisdiction in *Hubschman v. Antilles Airboats, Inc.*[152] The plaintiff was piloting one of the defendant's seaplanes. After an uneventful takeoff, the plane lost power in both engines and was forced to land a few miles northeast of the Puerto Rican Island of Culebra, in an area where the Atlantic Ocean and the Caribbean Sea meet.[153] The plane came apart and sank.[154] Three years after the accident,[155] the plaintiff filed an admiralty action claiming "unairworthiness" and "unseaworthiness,"[156] and seeking an

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form body of admiralty law to cover all phases of this flight, which, while not international, was for most of the flight beyond the territorial jurisdiction of the Virgin Islands. The court noted that flights over international waters were more likely to involve foreign nationals and this too supported the propriety of a federal admiralty court. *Id.*

[150] *Id.* The court noted that aircraft and marine accidents should receive similar treatment in the courts because both aviation law and marine law involve dealing with complex mechanisms and comparable legal terminologies. *Id.* at 688. The court drew analogies between concepts of marine law which have counterparts in aviation law: airworthiness and seaworthiness and rules of the road and last clear chance. *Id.* Further, noting that aviation accidents like maritime accidents engender lengthy investigations, the court proposed that plaintiffs in aircraft accidents should have the equitable doctrine of laches available to them. *Id.*

[151] *Id.* at 685. Note that while the court cited the fact that the crash had occurred in international waters as an alternate ground for jurisdiction, it did not limit its holding by locality.

[152] 440 F. Supp. 828 (D.V.I. 1977).

[153] *Id.* at 832.

[154] *Id.* at 833.

[155] The timeliness issue was considered by the court. The court stated: "As has been flatly stated, '[t]here is no statute of limitations in admiralty." Francis, et al. v. Pan American Trinidad Oil Co., 392 F. Supp. 1252, 1256 (D. Del. 1975)." *Id.* at 841.

[156] See Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 (1946), in which the Supreme Court announced unseaworthiness as a species of liability without fault. Mr. Chief Justice Rutledge, delivering the majority opinion, stated that a shipowner has an absolute duty to furnish a seaworthy ship which is not satisfied by the mere exercise of due diligence. *Id.* He elaborated: "It is a form of absolute duty owing to all within the range of its humitarian policy." *Id. See generally* 7A J. MOORE, *supra* note 16, at ¶

award for "maintenance and cure."[157] Because these are causes of action and remedies afforded only by admiralty courts, the case could be heard only if the court held that the facts properly constituted a maritime tort.[158]

The *Hubschman* court began its analysis with a discussion of *Executive Jet*. The court distinguished the facts before it from the facts which gave rise to the *Executive Jet* decision, and noted that the *Executive Jet* decision had not expressly ruled aviation accident suits out of admiralty courts.[159] The court noted, "The [Supreme Court], nonetheless dropped language by the wayside from which the expansive, as well as the restrictive readers of its opinion (the respective sides in the instant dispute) could take comfort."[160] The court then recited the cases relating to aviation accidents and maritime jurisdiction that have followed the *Executive Jet* decision, and noted the lack of uniformity in the standards.[161]

The court's analysis proceeded in a classic "locality plus"

.325[4]. In order to maintain this cause of action, the plaintiff would have had to have this seaplane judicially characterized as a "vessel."

[157] 440 F. Supp. 828, 833 (D.V.I. 1977). Only seamen are entitled to benefit from the provisions of the doctrine of "maintenance and cure." *See* 7A J. MOORE, *supra* note 16, at ¶ .325[4]. This is an ancient admiralty remedy, as fully articulated in O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). *See supra* note 51. In order to qualify for this award, the plaintiff would have to be himself judicially characterized as a seaman which is a fact question. *See generally* Mach v. Pennsylvania R.R. Co., 317 F.2d 761 (3d Cir. 1963) (holding that whether plaintiff is or is not a seaman is a question for the trier of fact, to be determined from the particular circumstances of each case).

[158] 440 F. Supp. at 834. Plaintiff based his cause of action on the Jones Act, 46 U.S.C. § 688 (1970). *See infra* note 184 and accompanying text. Soon after the accident, a claim for Workmen's Compensation under the laws of the Virgin Islands was filed, adjudicated and paid. 440 F. Supp. at 834.

[159] 440 F. Supp. at 835.

[160] *Id.* The defendants cited the language of *Executive Jet* referring to "[t]he mere fact that the alleged wrong occurs or is located on or over navigable waters. . .is not of itself sufficient to turn an airplane negligence case into a 'maritime tort.'" Executive Jet v. City of Cleveland, 409 U.S. 249, 268 (1972). Plaintiffs rely on the phrases:

> It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels.

Id. at 271.

[161] 440 F.Supp. at 839.

fashion.[162] Considering first the locality of the accident, the court concluded that it was certainly maritime. The court then determined that the alleged wrong had "a significant relationship to traditional maritime activity,"[163] basing this finding on the earlier *Hark v. Antilles Airboats, Inc.*[164] case. The court noted that the problems of taking off and landing a seaplane differ from those encountered with conventional aircraft.[165] Further, the court stated that "where the flight is over international waters, as it was here, there are especial conveniences in using the admiralty forum."[166] The court said that it was not confronted with a fortuitous open sea air crash. The plane in this case did not fall into the sea, as did its counterpart in *Executive Jet*; the seaplane was doing precisely what it was designed to do, *landing on the water.*[167] The court stated "One has to seek far and wide to find circumstances that more forcefully point to the existence of 'maritime nexus.' "[168] Holding that the plane was afloat upon navigable waters at the time of the occurrence, and was thus subject to the admiralty,[169] the court concluded that the fulfillment of a maritime function had been properly demonstrated.[170]

A consistent standard has not been applied by the federal

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[162] *See* Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967), *discussed supra at* note 39 and accompanying text.

[163] 440 F. Supp. at 840.

[164] 355 F. Supp. at 683 (D.V.I. 1973), *discussed supra at* notes 145-51 and accompanying text.

[165] 440 F. Supp. 840. Such problems are influenced by the aquatic nature of the runway used. *Id.*

[166] *Id.* The court in Hark v. Antilles Airboats, 355 F. Supp. 683 (D.V.I. 1973) noted that flights over international high seas were beyond the territorial jurisdiction of the point of departure. "It would therefore seem most convenient to refer to the nationally uniform admiralty laws to cover all phases of such a flight." *Id.* at 687. *See supra* note 149.

[167] 440 F. Supp. at 840.

[168] *Id.*

[169] *Id.* at 841. (quoting Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921). *See supra* note 59.

[170] *Id.* It is noteworthy, however, that while the court admitted the suit to admiralty, the court held that the seaplane was not a vessel nor was the pilot a seaman for purposes of "unseaworthiness" claims or the appeal for maintenance and cure. "It bears mention that sustained research has not uncovered a single case holding an aircraft to be a 'vessel' and the pilot of an aircraft to be a 'seaman.' " *Id.* at 848.

courts to aviation litigants seeking admiralty jurisdiction. The clarity that could have resulted from the *Executive Jet* decision has not materialized and now, instead of one criteria, "locality," there are a number of rationales with no clear focus. In *Teachey v. United States*,[171] the court inferred that the *function* at the time of the accident determined admiralty jurisdiction, but would not grant admiralty jurisdiction unless the cause of the accident was maritime. Looking also at function, the District Court in *Miller v. Cousins Properties, Inc.*[172] dismissed a suit involving a crash into a lake of a land-based passenger plane. In *Higginbotham v. Mobil Oil Corp.*,[173] the Fifth Circuit summarily held that the helicopter was a functional equivalent of a crewboat and granted jurisdiction.

The Ninth Circuit applied a "locality plus" test in granting jurisdiction to a transoceanic cargo plane's crash in *Roberts v. United States*,[174] but then adopted the *Kelly*[175] criteria of the Fifth Circuit shortly thereafter when considering *T.J. Falgout Boats, Inc. v. United States*.[176] A Pennsylvania district court decided that an aircraft crash resulting from weather problems is not a significant connection to traditional maritime activity in *American Home Assurance Co. v. United States*.[177] The District Court of the Virgin Islands has, on two occasions, granted admiralty jurisdiction to seaplane accidents. In *Hark v. Antilles Airboats, Inc.*[178] and *Hubschman v. Antilles Airboats, Inc.*[179] the court focused on the traditional

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[171] 363 F. Supp. 1197 (M.D. Fla. 1973). *See supra* notes 95-102 and accompanying text.

[172] 378 F. Supp. 711 (D.C. Vt. 1974).

[173] 357 F. Supp. 1164 (W.D. La. 1973), *aff'd in part*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other gournd*, 430 U.S. 618 (1978), *discussed supra at* notes 102-08 and accompanying text.

[174] 498 F.2d 520 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974), *discussed supra at* notes 115-23 and accompanying text.

[175] Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), *discussed supra at* notes 106-07 and accompanying text.

[176] 508 F.2d 855 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975), *discussed supra at* notes 124-33 and accompanying text.

[177] 389 F. Supp. 657 (M.D. Pa. 1975), *discussed supra at* notes 135-45 and accompanying text.

[178] 355 F. Supp. 683 (D.V.I. 1973), *discussed supra at* notes 145-51 and accompanying text.

[179] 440 F. Supp. 828 (D.V.I. 1977), *discussed supra at* notes 152-70 and accompa-

marine-like problems encountered by seaplanes in their take-offs and landings, and buttressed their grant of jurisdiction to policy considerations concerning the attractiveness of admiralty forums when dealing with flights over international waters.

THE JONES ACT IS EXTENDED TO AVIATION

Because the courts and legislatures have developed admiralty to provide a set of rules and principles applicable to the particular problems of maritime commerce and the attendant navigation considerations, they should also develop a body of law uniquely suited to aviation.[180] Aviation is not maritime and the industry does not necessarily serve the same functions or involve the same instrumentalities as maritime commerce. Further, the standard articulated in *Executive Jet* has not received uniform treatment by the courts nor has it been uniformly understood.[181] A recent example of the continuing lack of uniformity and consequent results thereof is well illustrated in the case of *Barger v. Petroleum Helicopters, Inc.*[182] in which Jones Act remedies were provided to a helicopter pilot following his judicial characterization as a "seaman." The scenario is quite similar to that of *Higginbotham*[183] in that it involves a helicopter transporting workers to offshore oil rigs. Although *Higginbotham* granted admiralty jurisdiction on the theory that the helicopter was the functional equivalent of a crewboat,[184] the plaintiff in *Barger* sought access on different grounds. In *Barger,* the plaintiff wanted the substantive admiralty law under the Jones Act[185] to apply in order to judicially

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nying text.

[180] *See generally* Note, *Hops, Skips and Jumps Into Admiralty Revisited,* 39 J. AIR L. & COMM. 625 (1973).

[181] *See supra* notes 170-78 and accompanying text.

[182] 514 F. Supp. 1199 (E.D. Tex. 1981).

[183] 357 F. Supp. 1164 (W.D. La. 1973). *See supra* notes 102-09 and accompanying text.

[184] *Id.* at 1167.

[185] Act of June 5, 1920 (Jones Act), ch. 250, § 33, 41 Stat. 1007 (1920) (currently codified at 46 U.S.C. § 688 (1976)). The Jones Act provides, in pertinent part, that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law,

characterize the helicopter as a "vessel" and himself as a "seaman."[186] This treatment would have allowed him access to the more attractive remedies and burdens of proof available under the Jones Act.[187] In analyzing the facts, the court defined "seaman" and "vessel" as including the pilot and helicopter and cited the *Higginbotham*[188] decision in both determinations.

The Fifth Circuit has formulated a three-part test for determining whether a given employee is a "seaman" for the purposes of the Jones Act:[189]

> with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

Id.

The act made applicable to seamen injured in the course of their employment the provisions of the Federal Employers Liability Act (FELA), 34 U.S.C. §§ 51-60 (1976), which gives to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. The term "seaman" is contained in the original Jones Act. In 1927 Congress enacted the Longshoremen and Harborworkers Compensation Act, 33 U.S.C. § 901 (1976) which applied to all maritime workers except masters or "members of a crew of a vessel." The Supreme Court held in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946) that the effect of the Act was to restrict the benefits of the Jones Act to "members of a crew of a vessel." *Id.* The terms "seaman" and "member of a crew" are not used interchangeably.

[186] 514 F. Supp. at 1205. A similar request was denied the plaintiff in Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828 (D.V.I. 1977), *discussed supra at* notes 152-69 and accompanying text. *See generally* 7A J. MOORE *supra* note 16 at ¶ .324[4].

[187] Included in these attractive doctrines are the concepts of unseaworthiness, maintenance and cure, and the Jones Act benefits. Unseaworthiness is a species of liability without fault. Maintenance and cure is a concept which entitles an injured seaman to full care and pay after he suffers an injury. The Jones Act supplies a tort cause of action to a seaman allowing him to seek compensation from his employer for personal injuries arising from maritime employment regardless of where the injury occurs. *See supra* notes 156-57, 185 and accompanying text.

[188] 514 F. Supp. at 1205-07. The court hinted at its willingness to expand jurisdiction when it said: "assuming for the moment that the helicopter in question was a vessel. . . ." *Id.* at 1206.

[189] *See* Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946); Guidry v. South La. Contractors, Inc., 614 F.2d 447 (5th Cir. 1980); Wixom v. Boland Marine & Mfg. Co., Inc., 614 F.2d 956 (5th Cir. 1980); Wilkerson v. Movible Offshore, Inc., 496 F. Supp. 1279 (E.D. Tex. 1980).

> 1) he must have a more or less permanent connection with
> 2) a vessel in navigation and
> 3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.[190]

The *Barger* court decided that because Barger had worked for the defendant for six years, he was "permanent." The court then moved from the first prong of the test directly to the third prong. Citing *Higginbotham v. Mobil Oil*[191] the court said that Barger was "no doubt" a contributor to the function of the "vessel" in the most essential way. "He was its pilot, navigator, and sole crewmember."[192] The *Higginbotham* finding that a helicopter was the functional equivalent of a crewboat was used to support the finding that the pilot of the helicopter, or crewboat, was a "seaman."[193]

The *Higginbotham* finding that the transportation of personnel to and from oil drilling platforms is a traditional maritime activity also was used as support for the *Barger* court's determination that a helicopter is a "vessel".[194] As part of its

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[190] 514 F. Supp. at 1205-06.

[191] *Id.* at 1206 (citing Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 433 n.13 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978)).

[192] 514 F. Supp. at 1206.

[193] *Id.*

[194] *Id.* In determining that the helicopter was a "vessel" the court used a "grab bag" analysis. First, it quoted cases stating the proposition that the Jones Act is remedial legislation and is to be broadly construed. *Id.* at 1206. Second, the court described the marine-like features of the helicopter: it was equipped with pontoons, a life raft and other life-saving apparatus; it had permanently affixed pontoons to enable it to land, take off, float and taxi on water. *Id.* Third, the court considered historical definitions of "vessel."

> The Merchant Marine Act of 1920, ch. 250, §§ 1-39, 41 Stat. 988-1008, which subsumes the Jones Act, incorporates the definition of "vessel" contained in the Shipping Act of 1916, 39 Stat. 728-38 (codified as amended at 46 U.S.C. § 801 (1976)). The Shipping Act provides: "The term 'vessel' includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water."

Id. at 1206-07.

Fourth, the court quoted the Fifth Circuit opinion in *Offshore Co. v. Robinson*, 266

analysis, the court stated that recent Fifth Circuit cases had, in defining "vessel," considered the *purpose* for which the craft was constructed and the *business* in which it was engaged. "Barger's helicopter was constructed for the purpose of transporting men and material across the navigable waters of the Gulf of Mexico. The craft was specifically designed for landings, takeoffs, and movement on water. Thus, the first prong of the analysis has been met."[195]

The court said that the defendant was the world's largest commercial helicopter firm and was engaged almost exclusively in the business of transporting personnel to and from oil drilling platforms located in the territorial and navigable waters of the United States and other countries.[196] Quoting the *Higginbotham* decision, the court said, "There is no doubt that this is a traditional maritime activity and that Barger's helicopter was the functional equivalent of a crewboat".[197] This degree of involvement in a maritime endeavor was held sufficient to satisfy the second prong of the court's analysis. Thus, the *Barger* court took a step that no court had previ-

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F.2d 769 (5th Cir. 1959), which adopted the definition of "vessel" from the Merchant Marine Act. The court said this statutory definition encompassed "special purpose structures not usually employed as means of transport by water but designed to float on water." 266 F.2d at 779.

The *Barger* court decided that a helicopter equipped with permanently affixed pontoons was certainly an artificial contrivance capable of being used to transport and to float on water. 514 F. Supp. at 1207.

As a fifth point of analysis, the court quoted again from *Robinson*:

> Attempts to fix unvarying meaning have [sic] a firm legal significance to such terms as "seaman", "vessel", "member of a crew" must come to grief on the facts. These terms have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of fact can determine their application in the circumstances of a particular case.

Id. at 1207 (quoting Offshore Co. v. Robinson, 266 F.2d at 779-80).

Finally, the court noted that floatation on water alone did not qualify a structure as a "vessel" under the Jones Act. *See supra* note 184. The additional element of risk and exposure to the hazards of the sea must also be present. *Id.* Noting that the helicopter pilots involved in offshore oil transport were clearly subject to these risks, the court found that the helicopter was a "vessel" under the Jones Act and that Barger was a "seaman." *Id.* at 1208.

[195] *Id.* at 1207 (emphasis added).

[196] *Id.*

[197] *Id.*

ously been willing to take and extended the liberal Jones Act remedies to litigants in aviation suits by bootstrapping a "locality plus" analysis onto a cause of action based on the Jones Act.[198] Numerous commentators believe that such a liberal application of Jones Act definitions to grant admiralty jurisdiction is as unwarranted and indefensible as the strict locality test that preceded it.[199]

DO AVIATION ACCIDENTS BELONG IN ADMIRALTY COURTS

Not all courts have been so hasty to grant jurisdiction based on mere technical compliance with the common law elements. The Fourth Circuit, in *Crosson v. Vance*[200] placed great weight on the historical aspects of admiralty in its decision to deny admiralty jurisdiction. Although the facts involved an injury to a swimmer and a vessel the court looked beyond these independent elements, stating that

> [t]he admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states.[201]

Historically based reasoning was also applied by an Iowa district court in *Clinton Board of Park Commissioners v. Claussen.*[202] In *Claussen,* even though the court made a finding of "locality" and "vessel", admiralty jurisdiction was de-

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[198] *See supra* note 170.

[199] *See generally* 7A J. MOORE, *supra* note 16, at ¶ .325[3]; Birdwell & Whitten, *Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet,* 1974 DUKE L.J. 757; Note, *Admiralty Jurisdiction: Executive Jet in Historical Perspective,* 34 OHIO ST. L.J. 355 (1973).

[200] 484 F.2d 840 (4th Cir. 1973).

[201] *Id.* at 840.

[202] 410 F. Supp. 320 (S.D. Iowa 1976) (a boy drowned after jumping from a floating platform, allegedly negligently secured by employees of a vessel; the platform became unsecured and floated off into the river and the boy, in confusion and fright, jumped off and drowned).

nied.[203] The court stated:

> The Court cannot conceive how the incident at bar satisfies the stated jurisdictional test when the historical underpinnings of admiralty law are considered. Neither party here can be said to have been involved in maritime navigation or commerce in the true admiralty sense, nor in the Court's opinion does any aspect of this matter relate in a significant way to the original concepts of federal admiralty law. The Court has difficulty accepting the notion that principles developed to govern the domestic shipping industry and to provide a uniform body of sea-related jurisprudence should be applied to what is essentially a wrongful death action clearly capable of efficient adjudication by state tort law.[204]

Other considerations also suggest that aviation accidents do not belong in admiralty jurisdiction. The plaintiff in admiralty court has available the traditional maritime remedies of attachment and garnishment and process in rem and liberal venue provisions.[205] In addition, he has available the very liberal substantive maritime law, including the concept of comparative negligence.[206] The plaintiff also need not concern himself with the statutes of limitation under admiralty jurisdiction.[207] The defendant in admiralty court may claim the benefits of the maritime concept of limitation of liability which allows him protection from a damage judgment in excess of the value of his wrecked vessel.[208] These concepts and remedies are uniquely suited to maritime industry.

A party could possibly challenge an assertion of admiralty jurisdiction on constitutional grounds. The constitutional

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[203] *Id.* at 326.

[204] *Id.* at 325.

[205] *See* 7A J. MOORE, *supra* note 16, at ¶ .325[5].

[206] *Id.*

[207] *Id.*

[208] *Id.* The Limitation of Liability Act of 1951, ch. 43, 9 Stat. 635 (codified as amended at 46 U.S.C.A. §§ 181-89 (1958)), provides that the shipowner may on the occurrence of some event for which the ship is liable—to cargo, to passengers, to employees or harbor workers or to some other ship—restrict his liability to whatever value the ship may have after the event—e.g. a few strippings from a wreck. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, ch. 10 (1975).

grant[209] could be interpreted to extend admiralty jurisdiction solely to cases of admiralty and maritime nature. Therefore, one could argue that the grant of admiralty jurisdiction to a high sea helicopter accident case is unconstitutional if one were to ascribe historic understanding to the language of the grant. As the Supreme Court said in *Executive Jet*,[210] "The mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters . . . is not of itself sufficient to turn an airplane negligence case into a maritime tort."[211]

What precisely is sufficient to turn an airplane negligence case into a maritime tort was not made clear in the 1972 Supreme Court decision *Executive Jet*. The approaches to discerning the proper interpretation of the "significant nexus" in the reported fact situations lend evidence to this lack of clear understanding.

The *Barger* plaintiff's admission to admiralty is a logical extension of jurisdictional development if one merely looks at the various phrases upon which the courts have focused since *Executive Jet*. The helicopter could be characterized as a substitute for a vessel. The defendant, Petroleum Helicopter, fits the description given to Mobil Oil in the *Higginbotham* case and thereby qualifies as a maritime defendant. The *Barger* plaintiff was the "pilot" of his "vessel" at the time of the accident and the "vessel" was performing the duties of a crewboat. Because the offshore oil industry is necessarily in the water, we cannot argue that geographic realities made the helicopter's contact with the water entirely fortuitous. There is a maritime nature to the runway that a helicopter equipped with pontoons must use for its take-offs and landings. Yet, while technically jurisdiction is proper, one may question the logic and policy served by this decision.

Since admiralty law has developed to serve the unique needs of ocean-going vessels and ocean-going seamen, the substantive law of admiralty is tailored to the needs of these parties. Unseaworthiness, maintenance and cure, the Jones Act

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[209] U.S. CONST. art. III, § 2, cl. 1.
[210] Executive Jet v. City of Cleveland, 409 U.S. 249 (1972).
[211] *Id.* at 268.

benefits and other admiralty doctrines were fashioned as a response to their perceived needs in the maritime industry. The aviation industry has also presented unique legal problems, but admiralty substantive law does not appear to be the most potent or appropriate solution. Until Congress provides the courts with a statute governing aviation as an industry,[212] the author suggests that the courts hearing suits arising from aviation torts deny admiralty jurisdiction to the litigants unless jurisdiction is expressly provided by the language of an existing statute. The argument for denying such litigants the benefits of admiralty substantive law is based on policies of protecting the justified expectations of the parties, protecting the justified expectation of the state with the dominant interest, and maintaining uniformity of the laws applicable to these two differing industries. Jurisdiction to admiralty courts is appropriately granted only when it is manifestly clear that the individual elements that make up the cause of action are substantially related to the traditional notions of maritime industry and commerce. When this is so, admiralty law is compelled by logic. When this is not so, the grant of jurisdiction

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[212] See S. 1876, 93d Cong., 1st Sess. (May 23, 1973) which would replace 28 U.S.C § 1333 (1966) and which in § 1316, provides in part as follows:

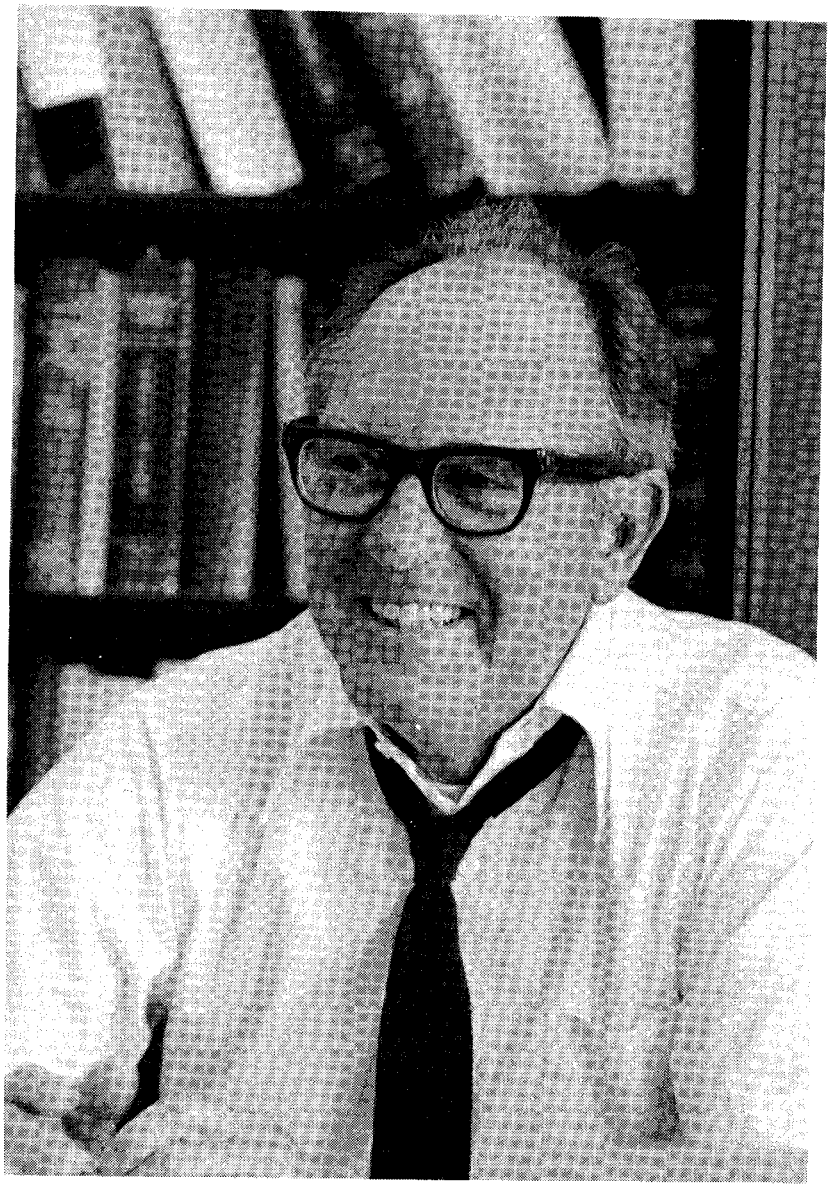
> (a) The district courts all have original jurisdiction without regard to amount in controversy of all civil actions of admiralty and maritime jurisdiction, including those of interpleader, declaratory or equitable relief, and including but not limited to the following:
> (1) any claim, whether founded in contract, or tort, arising out of the construction, mortgage, sale, ownership, possession, operation, navigation, chartering, servicing, or scrapping of any vessel of three hundred gross tons or more used or intended to be used on navigable waters, notwithstanding that the damage or injury involved be done or consummated on land;
> (2) ancillary and pendent jurisdiction . . . over nonmaritime, State, Federal, or foreign law claims, in any action where personal jurisdiction has been obtained in the plaintiff's original action; and
> (3) any claim arising out of an aircraft accident, occurring on or over the high seas or other navigable waters beyond a marine league from the shore of any state or the territories but such jurisdiction *shall not include:*
> (4) any claim solely because it arose on or over navigable waters of the United States.

Id. (emphasis added).

This bill was referred to the Judiciary Committee and has not been reported out.

merely adds to the confusion and cost involved in transacting business and litigating claims arising from business relationships.

The Editors are honored to dedicate this issue of the Journal of Air Law and Commerce to the memory of Aaron Joshua Thomas, Jr., Professor of Law and former Dean, Southern Methodist University School of Law, 1947 to 1982.



AARON JOSHUA THOMAS, JR.