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# Admiralty Jurisdiction - The Sky's the Limit

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# ADMIRALTY JURISDICTION — THE SKY'S THE LIMIT*

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## I. INTRODUCTION

A CLAIMANT WITH a cause of action cognizable within the admiralty jurisdiction of the federal district courts has long enjoyed several distinct advantages over his brethren asserting terrestrial claims. He can, for instance, commence his suit in a federal district court notwithstanding there is no diversity of citizenship, the amount in controversy does not exceed $10,000, and there is no other independent basis of federal jurisdiction.[1] Furthermore, he is not limited by the venue requirements of the Judicial Code, but may bring his action in any district in which the defendant may be served with process or in which any of the defendant's credits and effects can be attached or garnished.[2] Indeed, in some instances he need not proceed against an individual or corporate defendant at all but, once more at his election in most instances, he may proceed in rem directly against the so-called "offending res" provided it is located within the district where the suit is commenced.

In addition to these obvious advantages in commencing the action and in acquiring security for any judgment that might ultimately be rendered, a litigant with a cause of action within the admiralty jurisdiction will also be permitted in certain instances to take depositions *de bene esse*,[3] and may benefit from the somewhat broader rights of impleader applicable to parties in maritime proceedings.[4] Finally, and most important, in all but a very few instances the litigant whose claim is deemed maritime in nature will have the *choice* of proceeding within the admiralty jurisdiction of the federal district courts and making use of all or some of the above benefits or, pursuant to the saving to suitors clause, of proceeding in a state or (if there is an independent ground of federal jurisdiction) federal court where the cause will be governed by the rules applicable to non-maritime civil causes in the forum chosen.[5] Thus, in effect, by having

* This article will ultimately appear in a somewhat altered form in 7A MOORE, FEDERAL PRACTICE.

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[1] The Robert W. Parsons, 191 U.S. 17, 33 (1903); Strattan v. Jarvis, 33 U.S. (8 Pet.) 4 (1834) (amount in controversy); and Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833) (diversity of citizenship).

[2] 7A MOORE, FEDERAL PRACTICE ¶ 66 (2d ed. 1966).

[3] See note preceding 28 U.S.C. § 1781 (1964); 7A MOORE, FEDERAL PRACTICE ¶ 58 (2d ed. 1966).

[4] FED. R. CIV. P. 14; 7A MOORE, FEDERAL PRACTICE ¶ 54 (2d ed. 1966).

[5] 62 Stat. 931 (1948), 28 U.S.C. § 1333 (1964). The present act is a direct lineal descendant of the act of 24 Sept. 1789, 1 Stat. 73.

his cause designated as being within the admiralty jurisdiction, the litigant in most instances adds another string to his bow which he may elect to use or not use as best suits his purpose. In this respect characterization of a claim as maritime usually represents a potent addition to a claimant's arsenal. It is no wonder that with an ever increasing degree of frequency aviation lawyers are looking to admiralty when the transaction with which they are concerned involves both airplanes and navigable bodies of water.

To come within the maritime jurisdiction of the federal district courts a cause must be a case of "admiralty and maritime Jurisdiction. . . ." as provided in Article III of the Constitution and in Section 9 of the original Judiciary Act.[6] Notwithstanding the prognosticative genius of Leonardo DiVinci, it is obvious that neither the drafters of the Constitution nor the members of the first Congress were thinking of heavier than air craft while preparing either document. Similarly, it would be farfetched to assume that the federal courts of the nineteenth century had such craft in mind when they set about to determine the precise limits of the constitutional clause which ultimately was construed as encompassing all tortious acts occurring upon navigable waters and all contracts involving navigation and commerce upon such waters.[7] Thus, were the maritime jurisdiction of the district courts deemed frozen in the state in which it was when originally granted or construed, there would be no room for arguments that any contract actions and, perhaps, some tort actions involving airplanes could be brought within the admiralty jurisdiction. Admiralty jurisdiction as originally granted was not, however, intended to be forever bound by static concepts and boundaries. Subsequent decisions interpreting the constitutional grant and the Judiciary Act make it clear that the admiralty jurisdiction is not to lag behind technological or geographic advances and that it is to be extended as the need arises to areas where its application is logical, subject only to the restriction that no extensions of admiralty jurisdiction may pervert the very meaning of the Constitution.[8]

Thus, the question becomes one of determining precisely what, if any, causes involving airplanes and seaplanes can logically be construed as being within the scope of the admiralty jurisdiction and, additionally, whether such a construction should be favored. It is these problems with which the remainder of this article is concerned. Because of the anomalous fact that admiralty tort jurisdiction depends, at least ostensibly, predominately upon the situs of the occurrence while admiralty jurisdiction in contract is dependent upon the nature of the subject matter involved, the questions posed and the suggested solutions will be examined in the separate context of contracts and torts.

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[6] *Ibid.*

[7] See generally, North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119 (1919); Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870); and The Belfast, 74 U.S. (7 Wall.) 624 (1868).

[8] Panama R.R. v. Johnson, 264 U.S. 375, 386-87 (1924).

## II. Admiralty Contract Jurisdiction

The most relevant determination in deciding whether a contract is within the admiralty jurisdiction is ascertaining its connection with a vessel. Once it is shown that the structure involved is in fact a vessel as that term is defined for purposes of admiralty jurisdiction and that the contract sought to be enforced relates to commerce thereon or the navigation thereof, the contract will be deemed maritime. If, however, the structure does not qualify as a vessel, the courts have consistently held that contracts pertaining thereto are not maritime in nature and, consequently, are outside the scope of the admiralty jurisdiction.[9] Thus, unless the aircraft to which a particular contract pertains is somehow capable of being designated as a "vessel," it is unlikely that the courts will construe contracts connected therewith as being within the admiralty jurisdiction of the federal courts. Consequently, the remainder of this section will concern itself with a review of those instances in which the courts have, and have not, construed aircraft as "vessels" and the applicability of those decisions to the law of maritime contracts.

### A. *Airplanes And Seaplanes As Vessels*

With the advent of World War I the status of the airplane changed from that of a stunting device to a machine with distinct commercial possibilities, and agitation for uniform air laws arose. At first it was hypothesized that the airways were, like the oceans, navigable bodies and that, consequently, federal maritime law should be applicable. This somewhat forced interpretation gained little favor, and the general feeling was summed up in the comment that:

> Uniformity is of such obvious importance in any consideration of the regulation of air navigation that attention was naturally directed to the possibility of federal control. One of the earliest suggestions was that the admiralty and maritime jurisdiction offered the broadest basis for solving the problems of aviation. Whatever the theoretical advantages of such a solution, it is quite apparent that it is not available in this country. The admiralty jurisdiction is concerned with ships and navigable waters. Aviation deals with the navigation of the air. If the admiralty jurisdiction has on occasion been extended beyond limits recognized at the time of the adoption of the Federal Constitution, it has been extended only incidentally in the more comprehensive exercise of an express power. But air and water are entirely distinct and different elements. The grant of jurisdiction over navigable waters cannot possibly be construed to extend to navigation of the air.[10]

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[9] See, *inter alia*, Hercules v. The Brigadier General Absolom Baird, 214 F.2d 66 (3d Cir. 1954) (a dead ship not a vessel for maritime contract purposes); The Mackinaw, 165 Fed. 531 (D. Ore. 1908) (a pontoon floating upon navigable waters not a vessel); and The M. R. Brazos, 17 Fed. Cas. 951 (No. 9898) (S.D.N.Y. 1879) (floating bath house not a vessel). For a statutory definition of the term "vessel" see 61 Stat. 633 (1947), 1 U.S.C. § 3 (1964).

[10] Veeder, *The Legal Relation Between Aviation and Admiralty*, 2 Air L. Rev. 29 (1931). Notwithstanding the adamant position taken by Mr. Veeder that air navigation cannot be governed by admiralty in the United States, he does note that Great Britain at that time felt in no such way constrained. See The British Air Navigation Act of 1920, 10 & 11 Geo. 5, c. 80, art. 14(2) which provides that:

> His Majesty may, by order in council, make provisions as to the courts in which

Similarly, in 1929 the Committee on Air Law of the American Bar Association concluded that "the analogy of the high airs to the high seas is a forced one and that so serious a problem should not be attacked by an indirect method."[11]

Thus, from an early period there was little doubt that airplanes in general were not "vessels" within the scope of maritime contract jurisdiction. However, the applicability of maritime law to seaplanes or hydroaeroplanes posed a more difficult problem. These machines, functioning both in the air and on the seas, gave rise to most of the early conflicting decisions involving the question of whether an airplane could be a "vessel" for the purposes of admiralty jurisdiction.

The first case of consequence dealing with the status of airplanes as vessels was *The Crawford Bros. No. 2.*[12] This was a libel in rem for repairs brought against an airplane which had crashed into the waters of Puget Sound, and an exception was made by a salvage claimant that the admiralty court lacked jurisdiction over the matter. In sustaining the exception, the court held:

> In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the court that, in the absence of legislation conferring jurisdiction, none would obtain in this court, and that questions such as those raised by the libelant must be relegated to the common-law courts, courts of general jurisdiction.
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> The action of the Juridic Committee on Aviation manifests a recognition of the fact that legislation is necessary for the regulation of air craft. *They 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.*[13] (Emphasis added.)

The *Crawford Bros.* case was followed by Judge Cardozo's landmark decision in *Reinhardt v. Newport Flying Serv. Corp.*[14] There the plaintiff, whose job it was to care for a seaplane moored in navigable waters, was injured by the propeller of the seaplane while attempting to save it from drifting onto a beach where it might have been wrecked. He filed a claim under the New York Workmen's Compensation Law to recover for his injuries and the question arose as to whether he was injured by a "vessel." If he was injured by a vessel, admiralty jurisdiction would preclude a compensation claim. In dismissing the claim for compensation and holding that the claimant had been injured by a vessel and that admiralty had jurisdiction, Judge Cardozo stated:

> We think the craft, though new, is subject, while afloat, to the tribunals of the sea. Vessels in navigable waters are within the jurisdiction of the admiralty. Any structure used, or capable of being used, for transportation

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proceedings may be taken for enforcing any claim under this Act, or any other claim in respect of aircraft, and in particular may provide for conferring jurisdiction and applying to such proceedings any rules of practice or procedure applicable to proceedings in admiralty.

[11] See Knauth, *Aviation and Admiralty*, 6 AIR L. REV. 226 (1935).

[12] 215 Fed. 269 (W.D. Wash. 1914).

[13] *Id.* at 271.

[14] 232 N.Y. 115, 133 N.E. 371 (1921).

upon water, is a vessel. . . . All that remains is to ascertain the uses and capacities of the structure to be classified. The conclusion might be more dubious if the word "vessel" had been interpreted grudgingly and narrowly. The fact is that it has been interpreted liberally and broadly. It includes a canal boat drawn by horses . . . a bathhouse upon floats . . . a raft . . . a dredge . . . a temporarily sunken drillboat . . . anything upon the water where movement is predominant rather than fixity or permanence. . . . A hydro-aeroplane, while in the air, is not subject to the admiralty (Crawford Bros., No. 2, 215 Fed. Rep. 269), or so at least we may assume, because it is not then in navigable waters, and navigability is the test of admiralty jurisdiction. A hydro-aeroplane, while afloat upon waters capable of navigation, *is* subject to the admiralty, because location and function stamp it as a means of water transportation. Such a plane is, indeed, two things: a seaplane and an aeroplane. To the extent that it is the latter, it is not a vessel, for the medium through which it travels is the air. . . . To the extent that it is the former, it *is* a vessel, for the medium through which it travels is the water. . . . It is true that the primary function is then movement in the air, and that the function of movement in the water is auxiliary and secondary. That is, indeed, a reason why the jurisdiction of the admiralty should be excluded when the activities proper to the primary function are the occasion of the mischief. It is no reason for the exclusion of jurisdiction when the mischief is traceable to the function that is auxiliary and secondary.[15] (Emphasis supplied by court.)

The impact of *Reinhardt* was immediate and long lasting, and it is still a factor to be reckoned with in all cases involving airplanes, or at least seaplanes. Shortly after its issuance, and based solely thereon, an Appellate Division of the State of New York, in a unanimous memorandum opinion, reversed an earlier holding and decided that a seaplane was within the scope of a statute forbidding the operation without a muffler of any boat, barge, *vessel* or other floating structure propelled by an internal combustion engine.[16]

The rush to leap aboard Judge Cardozo's judicial bandwagon then subsided somewhat, in no doubt influenced by the enactment of the Air Commerce Act,[17] and two decisions (at least one of which involved a seaplane)

[15] *Id.* at 372.

[16] People v. Smith, 199 N.Y. Supp. 942 (App. Div. 1923). The memorandum decision, concurred in by all judges sitting, stated:

> Order (119 Misc. Rep. 294, 196 N.Y. Supp. 241) reversed on the law, and writ dismissed, upon the authority of Reinhardt v. Newport Flying Service Corporation . . . on the ground that the operation of a hydroaeroplane, on the waters of Lake George, propelled by an engine operated by the explosion of gasoline, without having the exhaust from the engine run through a muffler, or so constructed and used as to muffle the noise of the exhaust in a reasonable manner, is a violation of section 1500-a of the Penal Law. . . .

[17] 44 Stat. 568 (1926) (formerly 49 U.S.C. §§ 171-84). An understanding of the cases confronted with the question of whether an airplane is a "vessel" within the admiralty jurisdiction is made easier when each case is considered in the light of the then-applicable statutory provisions pertaining to aircraft. Rather than attempt to intersperse comments regarding such statutes throughout the text, it is believed more expedient and less confusing to set forth a brief discussion of such statutes in this note.

On 20 May 1926 Congress enacted the Air Commerce Act of 1926, thereby ending the speculation whether or not air navigation generally would be governed by admiralty principles. The act provided, *inter alia,* that

> The navigation and shipping laws of the United States, including any definition of "vessel" or "vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

That act, together with the Civil Aeronautics Act of 1938, governed air transportation until 1958,

followed holding that airplanes were not "vessels." The first of these was a well-reasoned decision by the Supreme Court of Missouri in *Wendorff v. Missouri.*[18] *Wendorff* involved an action to recover on a life insurance policy which excluded from its coverage death occurring as a result of an airplane mishap. The insured decedent was on a flight from Florida to the Bahamas in a seaplane which developed engine trouble and made a forced landing at sea. Shortly thereafter, the plane was capsized by waves and the insured drowned. In holding that the death occurred on an airplane and not on a maritime "vessel," the court concluded:

> It seems plain that for certain purposes, such as enforcement of harbor regulations and laws of the sea, there is good reason why a floating seaplane

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when both acts were repealed and their provisions substantially carried forward into the Federal Aviation Act of 1958, 72 Stat. 731 (1958), 49 U.S.C. §§ 1301-1542 (1964).

Certain of the maritime navigation rules designed to prevent collisions at sea were made applicable to seaplanes with the enactment in 1951 of the International Rules of Navigation at Sea. These International Rules were repealed in 1963, effective 1 Sept. 1965, with many of the provisions thereof incorporated in the newly enacted International Regulations for Preventing Collisions at Sea, 77 Stat. 194 (1963), 33 U.S.C. §§ 1051-94 (1964). That these regulations are intended to be applicable to seaplanes is clearly indicated by 77 Stat. 195 (1963), 33 U.S.C. § 1061(a) (1964), which provides:

> Sections 1061-1094 of this title shall be followed by all vessels and seaplanes upon the high seas and in all waters connected therewith navigable by seagoing vessels, except as provided in section 1092 of this title. Where, as a result of their special consrtuction, it is not possible for seaplanes to comply fully with the provisions of sections 1062-1074 of this title specifying the carrying of lights and shapes, these provisions shall be followed as closely as circumstances permit.

However, § 1509(a) of the Federal Aviation Act, which provides that "except as specifically provided in sections 143-147d of Title 33, the navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft," was not amended accordingly. Nevertheless, because of the mandatory language of the International Regulations, they must be taken as superseding provisions of the Federal Aviation Act which would make such regulations inapplicable to seaplanes.

While these statutory provisions could be construed to limit the applicability of all maritime principles (other than certain enumerated provisions pertaining to navigation) to aircraft of any nature, including seaplanes, they have not been so interpreted by the most recent decisions of the courts. See Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954), holding that the purpose of § 177 of the Air Commerce Act was to foster civil aviation by establishing federal aids to navigation and federal safety regulations. The term "navigation and shipping laws," declared therein to be applicable to seaplanes or other aircraft, referred only to those laws especially governing navigation and operation of the Merchant Marine, and was not intended to preclude application of the Death on the High Seas Act to a death resulting from an airplane crash on the high seas; Lambros Seaplane Base, Inc. v. The Batory, 215 F.2d 228 (2d Cir. 1954), holding that the provisions of § 177 of the Air Commerce Act do not preclude seaplanes from being the subject of maritime salvage; and Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), holding that the Federal Aviation Act is not intended either to create or to limit judicial jurisdiction, and it does not preclude the exercise of admiralty jurisdiction over aircraft crashes in navigable waters.

Thus, in the absence of contradictory judicial decisions, it does not appear that there are any statutory barriers to seaplanes or other aircraft coming within the jurisdiction of admiralty for purposes of either contract, tort, or salvage. *Cf.* United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950), where the court, in the course of deciding that an airplane was not a vessel within the scope of a criminal statute denouncing certain crimes committed on the high seas, held that the effect of the Air Commerce Act of 1926 was to legislate out of existence language in the *Reinhardt* case that a drifting plane is a vessel; and Junkerman, *Admiralty and the Ocean Air Lanes*, 26 INS. COUNSEL J. 548 (1959), wherein it is stated:

> Nevertheless, the Federal Aviation Act of 1958 . . . like its earliest predecessor (the Air Commerce Act of 1926), contains a provision to insure the fact that general laws relating to vessels and vehicles shall not apply to aircraft. [49 U.S.C. § 1509] Consequently, special statutes relating to vessels such as the limitation of liability provisions . . . apply only to seagoing vessels of certain classifications and do not apply to aircraft.

[18] 318 Mo. 363, 1 S.W.2d 99 (1927).

> should be subject to maritime rules. But does it follow that such a craft on the water always wholly loses its character as a flying machine? We think not. A seaplane is amphibious. It can float and move on the water, but its primary function is to navigate the air. If admiralty may disregard this latter function in dealing with the machine on facts bringing it within the range of that jurisdiction, why may it not also be regarded as an air vehicle when being used as such, though afloat, if that aspect of its dual nature is involved? . . . The craft was a "mechanical device for aerial navigation." We cannot hold it any the less that because forced down on the water at the time of the accident.[19]

A second post-*Reinhardt* decision seemingly unaffected thereby was *United States v. One Waco Bi-Plane*,[20] an unreported decision which simply held that a court of admiralty is without jurisdiction to establish and enforce a lien for repairs against an airplane because airplanes are not the subject of maritime jurisdiction.

The *Reinhardt* influence then became more apparent. In *United States v. One Fairchild Seaplane*,[21] the court concluded that it did have admiralty jurisdiction to enforce a libel in rem brought against a seaplane for the value of repairs made thereto even though the repairs had been made on land in a hangar on the shores of Lake Washington. The court followed *Reinhardt* and, additionally, concluded that the Air Commerce Act did not deny one the right to a maritime lien for repairing a seaplane. In *United States v. Northwest Air Serv., Inc.*,[22] the Ninth Circuit also cited *Reinhardt* with apparent approval, but concluded that:

> Although a seaplane, while afloat on navigable waters of the United States, may be a vessel within the admiralty jurisdiction . . . it is not such a vessel while stored in a hangar, on dry land, with its engine in a shop, also on dry land, undergoing repairs, nor does the making of such repairs create a maritime lien. . . .[23]

The impact of *Reinhardt* soon diminished, however, and for the twenty years following *Northwest Air Serv., Inc.* it was to take a back seat in the few reported decisions concerned with whether airplanes or seaplanes constituted "vessels" within the admiralty jurisdiction. Although none of these decisions involved matters of contract, they indicate a changing judicial attitude insofar as aircraft and admiralty jurisdiction are concerned. In *Dolling v. Pan-American Grace Airways, Inc.*,[24] one of the first of these "interim" decisions, the court held that a seaplane was not a vessel within the scope of the statute providing for limitation of liability. It stated:

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[19] *Id.* at 103.

[20] 1933 U.S. Av. 159 (D. Ariz. 1932), reversed without mention of this point in United States v. Batre, 69 F.2d 673 (9th Cir. 1934). The unreported district court opinion is discussed in Annot., 99 A.L.R. 177 (1934). There is no indication that the craft involved in this case was a seaplane and, if it was not, the decision is in accord with *Reinhardt*.

[21] 6 F. Supp. 579 (W.D. Wash. 1934).

[22] 80 F.2d 804 (9th Cir. 1935). A reluctance of the court to extend maritime jurisdiction to seaplanes may be inferred here since the Supreme Court had already concluded that matters pertaining to the repair of existing vessels in dry dock were within the admiralty jurisdiction. See Pacific S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119 (1919).

[23] *Id.* at 805.

[24] 27 F. Supp. 487 (S.D.N.Y. 1939).

> While, of course, the defendant's airship must effect its ascent either from (and likewise its descent upon) water or land, its real purpose is to navigate through the air, although it may operate on the water in a smooth sea, but that is purely an auxiliary function.
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> It does not seem conceivable to me that it can be seriously contended that the Congress ever had such craft in mind in granting a limitation of liability to the owner of a vessel, if such this be, within the definition contained in R.S. § 3, 1 U.S.C. § 3.[25]

In the same year the Southern District of New York, in *Noakes v. Imperial Airways, Ltd.*,[26] reached the same conclusion in a proceeding to limit liability commenced by the owner of a seaplane that had crashed into the sea. The court, although giving formal lip service to *Reinhardt*, held:

> The primary purpose and function of the Cavalier was to travel through the air. It was practically incapable of being used as a means of transportation on water, although its construction enabled it to embark on its journey from the sea and to alight on the water when it had reached its destination, but this was purely incidental to its flight through the air. It does not appear that it ever functioned as a "vessel". . . .
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> In my opinion the Cavalier, while flying to Bermuda, may not be classified as a "vessel" within the meaning of R.S. § 3, 1 U.S.C. § 3, and the Limitation of Liability Statutes. . . .[27]

The limitation cases were followed by a series of criminal cases illustrating even more vividly the extent of judicial departure from *Reinhardt*. Illustrative of these cases are *United States v. Peoples*,[28] holding that a stowaway on a naval air transport could not be prosecuted under a statute making it a criminal offense to stow away on a vessel, and *United States v. Cordova*,[29] holding that an offense committed on an airplane flying over the oceans was not punishable under a criminal statute denouncing certain acts committed on the high seas. In the course of its opinion in *Cordova*, the court stated:

> Finally, and on the negative side, the *Reinhardt case, even to the extent that it holds a drifting plane to be a vessel, has been legislated out of existence.* The Air Commerce Act of 1926 . . . now contains a section . . . providing that: "The navigation and shipping laws of the United States, including the rules for the prevention of collisions, shall not be construed to apply

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[25] *Id.* at 488-89.

[26] 29 F. Supp. 412 (S.D.N.Y. 1939).

[27] *Id.* at 413-14.

[28] 50 F. Supp. 462, 463 (N.D. Cal. 1943). In the course of its decision the court held: Ordinarily words in a statute are given their usual and customary meaning. When 18 U.S.C.A. § 469 was being considered by Congress in June of 1940 it was apparent that the courts were tending to construe the word "vessel" in the ordinary sense of a craft or contrivance whose primary purpose is operation on water and that so construed it would not include a seaplane. The brief discussion preceding passage of this bill by the House indicates that the legislators likewise construed the term in such ordinary sense since the word "ship" is used throughout and there is nothing to show that they had aircraft, as well, in mind. Further evidence that "vessel", as defined in 1 U.S.C.A. § 3, is not broad enough to include aircraft may be found in the fact that in 1941 Congress amended 34 U.S.C.A. § 1131, relating to captures of vessels made as prize, to provide that, as used in that chapter, "vessel" and "ship" should include aircraft and "master" should include the pilot or other person in command of such aircraft.

[29] 89 F. Supp. 298 (E.D.N.Y. 1950).

to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft."

It seems, therefore, clear on precedent and on principle that even after airplanes became well-known, both Congress and the courts, saving the Reinhardt case, refused, and still refuse, to consider them as vessels even when they were afloat. In the instant case the plane was in flight, and it seems beyond argument that Cordova's acts cannot be prosecuted under a statute dealing with crimes committed on a "vessel."[30] (Emphasis added.)

With *Cordova,* decided in 1950, the pendulum had swung full cycle away from *Reinhardt* and it appeared that the courts would not consider any type of airplane or seaplane a "vessel" within the admiralty jurisdiction for any purpose. The reverse swing of the pendulum began rather unexpectedly in 1954 with *Lambros Seaplane Base, Inc. v. The Batory.*[31] This was an action for conversion brought in admiralty by the owner of a seaplane against a ship and its owners. The libelant averred that its seaplane, which had landed on the ocean some twelve miles off Fire Island, had been wrongfully taken aboard respondent's vessel and transported to England where it was sold. The claimant-respondent filed a cross-libel for salvage to recover for services rendered to the plane when in alleged peril. The district judge, although holding that the evidence did not support an action for conversion, decided that the respondent was so negligent in taking the seaplane aboard under the suspicious circumstances extant that it should be held responsible for the libelant's damages and concluded that:

In the light of this ruling it is unnecessary for me to determine whether a seaplane may be considered a vessel and hence the subject matter of salvage. In any event, Judge McGohey passed upon this question in the affirmative on a preliminary motion in this case.[32]

Following an appeal by the owner of the Batory, the Second Circuit first looked to some of the older maritime cases defining vessels, not bothering to distinguish between those involving maritime liens for repairs and suits for salvage, and stated:

The appellee, Lambros, predicates error on an interlocutory ruling below which overruled its exception to the cross-libel based on a contention that

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[30] *Id.* at 302.

[31] 215 F.2d 228 (2d Cir. 1954).

[32] 117 F. Supp. 16, 21-22 (S.D.N.Y. 1953). See also Gdynia-America Shipping Lines, Ltd. v. Lambros Seaplane Base, Inc., 115 F. Supp. 796 (S.D.N.Y. 1953), where District Judge McGohey, in holding that a seaplane was a proper subject for salvage, stated:

The libelant's chief contention on oral argument was that a seaplane is not a proper subject of salvage. While no Federal Court decision has been cited or found holding that a seaplane is a vessel for purposes of salvage, I entertain no doubt that it is. The U.S. Code Annotated defines the word vessel as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." A seaplane surely comes within this definition which has been held to include a canal boat drawn by horses, a floating dredge, a scow, a bath house built on boats, a raft and a floating fish net. And New York's Court of Appeals has held a "hydroaeroplane" to be a vessel. This is consistent with the principle of salvage awards which is to give an incentive to seamen to risk their own safety and expend their own time and energy to undertake to save life and property from loss at sea. The respondent certainly performed a valuable salvage service and its claim is one for which relief can be granted. *Id.* at 797.

a seaplane is not a vessel which is susceptible of salvage under the maritime law. That contention is also advanced as valid support for the decree below dismissing the cross-libel. As to this, in the *Robert W. Parsons* . . . it was held that canal boats drawn by horses on the Erie Canal were subject to maritime lien for repairs, the Court saying . . . "In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged*** So long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion, which may vary in the course of the same voyage, or with discoveries made in the art of navigation." And in *Cope v. Vallette Dry Dock Co.* . . . in which it was held that a floating drydock permanently moored to the bank of the Mississippi and not designed or used for navigation was not a subject-matter of salvage merely because it floated, it was said that "ships" and "vessels," as terms to describe objects susceptible of salvage are terms "used in a very broad sense, to include all navigable structures intended for transportation."

These judicial tests as announced by the Supreme Court are plainly broad enough to permit inclusion of a seaplane amongst the vessels which are subjected to salvage. There is an express dictum to that effect by Judge Cardozo in *Reinhardt v. Newport Flying Service Corp.* . . . It has been held that when on land a seaplane is not subject to maritime lien for repairs, with a judicial reservation that it might have status as a marine object "while afloat on navigable waters."[33]

The court, without comment, then mentioned those cases decided in the two decades preceding *Lambros* holding that airplanes could not be vessels within the purview of certain criminal statutes and the statutes providing for limitation of liability,[34] and launched into a detailed discussion of the applicable statutory law. After holding that those provisions in the Air Commerce Act to the effect that the federal navigation and shipping laws (including any definition of "vessel") do not apply to seaplanes or other aircraft were not determinative of the maritime law governing salvage of aircraft at sea, the court stated: "The underlying policy of the law to encourage salvage applies to seaplanes as well as to other types of vessels long known to admiralty."[35] Then, and once more without distinguishing between the various judicial tests previously referred to which were "plainly broad enough to permit inclusion of a seaplane amongst the vessels which are subject to salvage" and the applicable statutory provisions, the court concluded: "On all the foregoing considerations, we sustain the ruling below that a seaplane when on the sea is a maritime object which is subject to the maritime law of salvage."[36]

[33] Lambros Seaplane Base, Inc. v. The Batory, 215 F.2d 228, 231 (2d Cir. 1954).

[34] See notes 22-28 *supra*.

[35] 215 F.2d at 233.

[36] *Ibid.* In commenting on the development of the statutory law, the court stated:

To a parallel development of the maritime law through judicial decisions of the United States Courts of Admiralty, Congress has interposed no obstacles. In 1866, long before the advent of aircraft, Congress had passed an Act for the prevention of smuggling in which a "vessel" was defined as including "every description of water-craft***and contrivance used or capable of being used as a means***of transportation on or by water." 14 Stat. 178. The definition, without substantial change, appears as Sec. 3 of the Revised Statutes. It was re-enacted verbatim as Sec. 3 of the Act of July 30, 1947, which constituted Title 1 of the United States Code. 61 Stat. 633, 1 U.S.C.A. § 3. In Title 1 of the Code it is a part of "Chapter 1.—Rules of Construc-

Insofar as *Lambros* stands for the proposition that a seaplane can be the subject of maritime salvage it is sound, since the courts, in their zeal to encourage persons to render prompt service in emergencies, have long ago gone beyond holding that only "vessels" and their cargo qualify for salvage purposes. Furthermore, for matters of salvage it seems unnecessary to distinguish between seaplanes and ordinary aircraft which may crash into the oceans, the only important consideration appearing to be that the craft or structure be in peril on navigable waters.[37] The language of the court in *Lambros,* however, makes it unclear whether it was intended that

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tion" thus indicating that it was enacted as a rule for the construction of federal statutes generally. Obviously the language of the definition is broad enough to cover seaplanes, but we find no basis for taking this general rule of statutory construction as indication of legislative intent to state or restate the general maritime law which is still, except for minor statutory modifications not relevant to the problem here, the source of the law which governs salvage at sea. The Impoco, D.C., 287 F. 400. Robinson on Admiralty (1939), p. 716; Benedict on Admiralty (6th Ed.), Vol. 1, Sec. 58.

Even less determinative of the maritime law are statutory definitions adopted for application to particular statutes, such for example the definition both of "vehicle" and of "vessel" as exclusive of aircraft for purposes of the customs laws. 19 U.S.C.A. § 1401(a) and (b). In this category belongs the Air Commerce Act of 1926, 44 Stat. 572, 49 U.S.C.A. § 177(a), upon which the appellee chiefly relies, which for purposes of that act provided: "The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." This provision also did not purport to touch the law of salvage.

However, we think it worth noting that the above quoted extract from the Air Commerce Act, in conformity with the London Convention of 1948, was amended in 1951, 65 Stat. 407, 49 U.S.C.A. § 177(a) to read as follows: "*Except as specifically provided in sections 143-147(d) of Title 33,* the navigation and shipping laws of the United States *** shall not be construed to apply to seaplanes or other aircraft." (Emphasis supplied.) And this amendment of the Air Commerce Act was included in a sweeping amendment of the navigation laws, 65 Stat. 406, whereby Congress gave the President power to promulgate navigation regulations for the prevention of "collisions involving waterborne craft upon the high seas" which regulations were stated to apply to "all aircraft of United States registry to the extent therein made applicable," 33 U.S.C.A. § 143, and to "all vessels and seaplanes upon the high seas," 33 U.S.C.A. § 144(a); which defined a seaplane as a "flying boat and any other aircraft designed to manoeuver on the water," 33 U.S.C.A. § 144(c); and which also provided for a specified code of signals for use "When a vessel or seaplane on the water is in distress and requires assistance from other vessels or from the shore." 33 U.S.C.A. § 147c. Although the amendatory Act of 1951, like all other federal statutes, was not intended nor effective either to state or to modify the maritime law of salvage, we think the Congressional recognition of the need to assimilate into the navigation laws the regulation of seaplanes is a cogent suggestion that Courts of Admiralty, to whom in large measure Congress has been content to confide the development of maritime law; if they are to keep step with the times should similarly assimilate seaplanes into the maritime law of salvage. The underlying policy of the law to encourage salvage applies to seaplanes as well as to the other types of vessels long known to admiralty.

We note further that in 1931, the Senate ratified a treaty, known as the Pan American Convention on Commercial Aviation of 1928, with several Latin American nations, 47 Stat. 1901, which in Article XXVI provided: "The salvage of aircraft lost at sea shall be regulated, in the absence of any agreement to the contrary, by the principles of maritime law." Professor Robinson in his work on Admiralty (page 715, note 18) refers to the Paris Air Navigation Convention of 1919 and (page 716) to the Brussels Convention of 1938 which contained provisions to that effect. See also Knauth on Aviation and Salvage, 36 Col.L.R. 224 and Hotchkiss on The Law of Aviation (2d Ed.), page 88. Although no international convention appears to control our decision here, we think it well worth noting that there is this highly reputable concensus [sic] of thought expressed by those participating in the development of international law, which is in harmony with a development of the general maritime law in line with Gdynia's contention. *Id.* at 232-33.

[37] See GILMORE & BLACK, THE LAW OF ADMIRALTY chap. 8 (1957).

the case be limited in its application to matters of salvage or whether it was intended to stand for the proposition that airplanes, while on navigable waters, could be treated as vessels for all maritime purposes, including that of determining whether maritime contract jurisdiction exists. It is also unclear whether the decision was based on and intended to affect statutory interpretation, prior salvage cases, prior cases dealing with maritime liens for repairs, prior limitation or criminal cases, or a combination of all or some of these authorities. Thus, whether *Lambros* only began the voyage of the pendulum back toward *Reinhardt* or completed the journey in one fell swoop is left unanswered and awaits further judicial clarification.

The problem of whether airplanes can be classified as "vessels" for the purposes of maritime contract jurisdiction has been further complicated by a series of post-*Lambros* decisions concerned with actions based in part on breach of warranty to recover compensation for deaths or injury of passengers and crew in airplanes crashing into navigable waters.

An early case concerned with whether an action for breach of warranty could be maintained in admiralty to recover for injuries or death resulting from an airplane crash into the high seas was *Middleton v. United Aircraft Corp.*[38] There, in a warranty action brought against a helicopter manufacturer by the personal representative of the deceased pilot of a helicopter that crashed upon the high seas, the court refused to grant a motion to dismiss based upon failure to state claims upon which relief could be granted in admiralty. The court failed to discuss the case as involving serious questions of maritime contract jurisdiction, stating instead that "The cause of action complained of appears to be a maritime tort . . . . 'Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred.' "[39] Finally it concluded that, in view of the modern trend, "an action based on the breach of an implied warranty should not be dismissed because of the lack of privity between the plaintiff and defendant."

Two years later, in *Noel v. United Aircraft Corp.*,[40] the Delaware district court reached a contrary conclusion. In *Noel*, an action brought pursuant to the Death on the High Seas Act to recover for the death of

[38] 204 F. Supp. 856 (S.D.N.Y. 1960).

[39] *Id.* at 860.

[40] 204 F. Supp. 929 (D. Del. 1962). In commenting on actions for breach of warranty in admiralty the court stated that:

> With the exception of one case . . . an implied warranty of fitness and merchantability has never been successfully asserted in admiralty, so far as research has disclosed. This may well be because an implied warranty of fitness is usually associated with the sale of goods, and because the sale of a ship has traditionally been deemed outside the scope of admiralty jurisdiction. . . . Another reason why an implied warranty of fitness is unknown to admiralty may be that it has always been possible to bring actions under this theory on the civil side of the court. For instance, there are a number of cases in which breach of implied warranty has been asserted in connection with the sale of barges or tankers. . . . None of these cases applied admiralty principles. All relied upon the sales or contract law of particular states. In the only Supreme Court case found on point it was held that the law governing the sale of vessels was the sales law of the state where the contract of sale was made. . . . The Court concludes that an implied warranty of fitness and merchantability is a phenomenon of state sales law, and, as such, is unknown to the federal maritime law. *Id.* at 934.

a passenger on an airplane that crashed into the high seas, the libellants sought to amend their libel by adding a claim based on breach of an implied warranty of fitness of the propellers on the airplane involved. The court, in denying the motion, held that actions for breach of the implied warranties of fitness and of merchantability are not within the scope of maritime contract jurisdiction. It disposed of *Middleton* in this manner:

> The Court [in Middleton] relying upon negligence principles grounded upon the dangerous instrumentality doctrine, and with little or no analysis of the DOHSA or of admiralty concepts, proceeded to hold that admiralty might entertain a suit based upon a breach of implied warranty regardless of the lack of privity. The important and key question, namely whether admiralty, in which warranties in favor of passengers were heretofore unknown, should henceforth entertain suits on behalf of passengers against manufacturers of airplane or related parts based upon a breach of warranty of fitness *whether or not privity was present,* was not discussed. While the decision, being in admiralty, is entitled to respect, the failure of the Court to recognize and dispose of a number of valid arguments against the result there reached detracts from its weight.[41] (Emphasis supplied by the court.)

This same district court reaffirmed its position on this point some two years later in *Jennings v. Goodyear Aircraft Corp.*,[42] an action by a widow against the manufacturer of a Navy dirigible for the death of her husband, stating:

> Counsel did not distinguish between tort and warranty claims. However, since allegations of the complaint appear to raise both types of claims, a distinction between the two must be made. Contrary to my holding with respect to tort claims, a cause of action based on claims sounding in warranty may be asserted in the state court under state law. *Aside from the fact there is no maritime contract involved in this case, this court in Noel, supra, held a cause of action in implied warranty of fitness and merchantability does not exist in federal maritime law.*[43] (Emphasis added.)

In the interval between *Noel* and *Jennings,* however, the Third Circuit decided *Weinstein v. Eastern Air Lines, Inc.*[44] *Weinstein* dealt with an action for wrongful death caused by the crash of an airplane into navigable waters off Boston Harbor during a scheduled flight from Boston to Philadelphia. In addition to the usual tort claims, the decedent's personal representative also brought an action in admiralty against the defendant airline and the manufacturer of the airplane based on breach of the warranties that the airplane was safe, airworthy and fit to be used as a common carrier for hire by air and an action against the airline for breach of the contract to provide safe and airworthy transportation. Both the district court[45] and the Court of Appeals dismissed the contract and warranty claims. In agreeing with the airline's contention that they were not within the admiralty jurisdiction, the Third Circuit stated:

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[41] *Id.* at 937.

[42] 227 F. Supp. 246 (D. Del. 1964).

[43] *Id.* at 248.

[44] 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963).

[45] Weinstein v. Eastern Air Lines, Inc., 203 F. Supp. 430 (E.D. Pa. 1962), *rev'd,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963).

> The claims involving breach of contract and of warranty in the appeals at bar present a different situation. . . . Admiralty jurisdiction over contracts is dependent upon the subject matter of the contract. The test is very different from that applicable in respect to tort claims. [Citations omitted.] "It is settled that the contract articulated in a libel must be, directly and in essence, an obligation maritime in its nature, for the performance of maritime service or transactions, to confer jurisdiction." . . . It is clear, we believe, that a contract or warranty relating to the airframe or power plant of a land-based aircraft and a contract of carriage by air between two cities on the United States mainland are not maritime in substance, nor are such contracts and warranties made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters enroute from Boston to Philadelphia.[46]

However, the court, although resting its decision upon the quoted language, added the following footnote: "We, of course, do not decide whether such contracts would be maritime in substance were the aircraft involved a trans-Atlantic carrier en route from Boston, to, for example, Shannon, Ireland."[47] This footnote, with its caveat, left the door wide open for subsequent decisions that the trans-oceanic air carriage of persons or cargo is within the scope of admiralty contract jurisdiction, and it was in fact used to great advantage by the Southern District of New York in *Montgomery v. Goodyear Tire & Rubber Co.*[48]

*Montgomery* was an action in admiralty to recover for the wrongful death of servicemen aboard a naval dirigible which crashed into navigable waters of the Atlantic Ocean. In addition to allegations in tort, it was contended that the respondent Goodyear breached implied warranties of fitness and merchantability in manufacturing the dirigible involved. Goodyear's motion for a summary judgment was denied. The court, in the course of arriving at its decision, commented that:

> Most recently, admiralty's recognition of warranty actions was considered in Weinstein v. Eastern Airlines. . . . In that case, a land-based airplane crashed within the territorial waters of a state. Libellants sued the manufacturer of the plane, Lockheed Aircraft Corporation, and the manufacturer of the power plant, General Motors, for breach of implied warranties of fitness and merchantability. In regard to the warranty action, the court stated the test for recognition of the action in admiralty to be the traditional requisites of an admiralty contract—was this "an obligation maritime in its nature, for the performance of maritime service or transactions"?
>
> The contracts there in question did not meet this test because they grew out of transactions covering the manufacture of land-based aircraft and carriage by air between two cities on the mainland. The fact that the crash took place over water was incidental in this context.
>
> However, the court left open the question of admiralty's recognition of a contract dealing with a plane whose route was primarily over water. (See note 22, p. 766.) We believe that the dirigible involved here is covered by that exception. Its manufacture was for the Navy, and it was intended for

[46] Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758, 766 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[47] *Ibid.*

[48] 231 F. Supp. 447 (S.D.N.Y. 1964).

use primarily over water. Given these facts, it was more likely than not that a crash would take place over water, and so within admiralty jurisdiction.[49]

The court in *Montgomery* then neatly circumvented the fact that the warranty claim with which it was concerned arose out of the contract for the manufacture of the airship and that "it is a well recognized principle of admiralty law that a contract to build a ship is not, in and of itself, a maritime contract" by holding that, despite this principle, "recent developments in the Supreme Court indicate a broadening of the scope of implied warranties in admiralty cases." Furthermore—and this may be the most rational answer to the problem—the court concluded that "moreover, the recent trend in personal injury and death cases based on warranty has been to treat the action as one in the nature of tort, ignoring contract considerations."

### B. *Suggested Approach*

Exactly where the decisions referred to in this section leave the airplane insofar as admiralty contract jurisdiction is concerned is not altogether clear. It can be said with some assurance that the simple reasoning of *The Crawford Bros.* that airplanes are not subject to maritime jurisdiction because "not being of the sea or restricted in their activities to navigable waters, they are not subject to maritime jurisdiction" is no longer a valid statement of the law. However, it seems just as difficult to support a contention that *Montgomery* stands for the proposition that all contracts relating to trans-oceanic flights are maritime in nature and, therefore, within the admiralty jurisdiction. Similarly, whether or not Judge Cardozo's famous dicta in *Reinhardt* has been revived by the *Lambros* decision and by the failure of some of the more recent warranty cases to distinguish between actions based on breach of warranties and breach of a contract to carry passengers over navigable waters[50] also remains unanswered, awaiting further judicial clarification.

Because of the transitory nature of airplanes and their crews there does appear to be some justification for the applicability of certain maritime remedies, particularly those of attachment and garnishment and process in rem, to matters of contract dealing with or concerning aircraft. It is believed, however, that this is a matter that can best be solved by federal legislation or, insofar as this is possible, by judicial decisions aimed directly at aircraft and which do not attempt to achieve what may be desirable results by forced and unnatural extensions of the admiralty jurisdiction by interpreting the term "vessel" to include aircraft in certain instances.

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[49] *Id.* at 453-54.

[50] See, *inter alia*, Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963). While it may be plausible to attempt to justify the application of maritime principles to warranty actions treating such causes as tortious in nature (see Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964) and the discussion of maritime torts *infra*) the same reasoning does not apply to actions for breach of a contract to carry passengers or cargo which have no characteristics of actions in tort. The apparent willingness of some courts to apply maritime principles to contracts of carriage entirely or primarily over navigable waters could well be construed as a tacit acceptance and expansion of Judge Cardozo's dicta in *Reinhardt* since it cannot be justified on the same basis as the extension of maritime law to warranty causes.

In addition to this interpretation not being entirely accurate when viewed in context, it is conducive to bizarre results. For instance, a contract pertaining to the shipment of goods or persons from Boston to Philadelphia, much of which is over navigable waters, has been deemed non-maritime while it has been hinted that a contract for a similar shipment from Boston to Shannon, Ireland would be deemed maritime.[51] And, conceivably, the shipment of goods by seaplane from Boston to Philadelphia would be governed by non-maritime civil principles while the airplane is airborne and by maritime principles during landings and take-offs. Precisely where a landing or take-off begins or ends—*i.e.*, with the descent or ascension or with the actual contact with or leaving of the water—could provide another interesting but unnecessarily burdensome problem. If admiralty contract principles should apply to any air travel, they should apply to all flights. There is no more need for in rem and quasi in rem remedies for trans-oceanic flights than there is for flights from New York to California or from Detroit to Montreal. Similarly, the flight of a seaplane from New Orleans to Chicago should be subject to no different laws than the flight of an ordinary aircraft between the same cities, nor should one furnishing services and supplies to such a seaplane be given any different rights than one furnishing similar services or supplies to an ordinary aircraft.

It is our belief that while, as stated long before the airplane reached its present state of usefulness, there may well be instances where maritime law should be applicable to aircraft—such as in matters of salvage and certain rules of navigation concerning seaplanes while on navigable bodies of water—neither logic nor commercial expediency compel a forced application of maritime contract principles to lighter-than-air craft. It is important that air commerce generally, and in particular insofar as matters of contract are concerned, be governed by uniform laws or principles applicable in all instances and that rights and remedies not be dictated by such often fortuitous and wholly irrelevant circumstances as the nature of the underlying terrain or of the aircraft.[52]

## III. Admiralty Tort Jurisdiction

In determining whether causes of action in tort occurring on or connected with airplanes may be within the admiralty jurisdiction, it is not necessary that the craft be classified as a "vessel" or that it be engaged in maritime commerce or navigation. For some anomalous reason the overwhelming weight of authority has long been that the situs of the place of injury alone determines whether a tort is or is not maritime.[53] If the

[51] Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[52] See note 124 *infra* and accompanying text for a possible legislative solution.

[53] Although the soundness of this conclusion is questionable, the cases supporting it are legion. See, *inter alia*, The Plymouth, 70 U.S. (3 Wall.) 20 (1865); Philadelphia, W. & B. R.R. v. Philadelphia & Harve De Grace Steam Towboat Co., 64 U.S. (23 How.) 209 (1859); and DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (D. Mass. 1815).

For more recent applications of the principle that locality alone, and not the maritime nature of the tort, is the controlling criteria in determining admiralty jurisdiction see: Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963); Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir. 1961); Berwind-White Coal Mining Co. v. City of New York, 135 F.2d

tort occurs upon navigable waters, it will be deemed maritime notwithstanding its lack of connection with a vessel or with the maritime industry, and conversely, if it occurs on land it will, with certain exceptions not generally applicable when dealing with airplanes, be deemed non-maritime.[54] Thus, those cases discussed in the earlier sections of this article concerned with whether aircraft are vessels within the admiralty jurisdiction are not necessarily relevant in determining whether torts caused by or occurring on airplanes are cognizable within the admiralty jurisdiction, and new authority must be examined.

### A. *Airplanes And Maritime Torts*

Whether torts concerning airplanes are maritime, and thus within the admiralty jurisdiction, has not until fairly recently been a problem of major concern. With the post-World War II rise in inter-continental air carriage and the resultant increase of crashes into the high seas, however, the maritime status of such torts has taken on a new and greatly increased significance.

The early language of Judge Cardozo in *Reinhardt v. Newport Flying Serv. Corp.*,[55] coupled with the venerable maxim that location is the sole criteria of maritime torts, would seem to lead unerringly to the conclusion

443 (2d Cir. 1943); Utzinger v. United States, 1965 Am. Mar. Cas. 1215 (S.D. Ohio); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964); Francese v. United States, 229 F. Supp. 10 (E.D.N.Y. 1964); Mings v. United States, 222 F. Supp. 996 (S.D. Cal. 1963); King v. Testerman, 214 F. Supp. 335 (E.D. La. 1963); Bergeron v. Aero Associates, Inc., 213 F. Supp. 936 (E.D. La. 1963); Luckenbach S.S. Co. v. Coast Mfg. & Supply Co., 185 F. Supp. 910 (E.D.N.Y. 1960); and Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954). See also Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) (where the court did not look for a maritime connection in an action to recover for injuries to a visitor aboard a vessel); London Guar. & Acc. Co. v. Industrial Acc. Comm'n, 279 U.S. 109, 123 (1929) ("It is clearly established that the jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel, but rather upon its having been committed upon the high seas or other navigable waters."); and Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922) (a tort committed on navigable waters upon an incomplete vessel still under construction was within the admiralty jurisdiction notwithstanding that such structure, for contract purposes, was not yet within the admiralty jurisdiction). *But see*, Judge Benedict's "famous doubt" set forth in BENEDICT, THE AMERICAN ADMIRALTY 173 (1850); Campbell v. H. Hackfeld & Co., 125 Fed. 696 (9th Cir. 1903); and McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961), all of which indicate that the broadness of the majority view has been more freely stated than applied.

Reference is also made to the plethora of recent cases and articles in the area of conflict of laws clearly indicating the welcome demise of the vested rights theory of selecting the jurisdiction whose laws will apply to non-maritime civil cases. Just as the situs of the injury is no longer deemed sufficient in and of itself for civil conflict of laws purposes, reason indicates that situs alone should not be solely determinative of whether a tort is or is not maritime.

[54] Torts occurring on land have been deemed within the admiralty jurisdiction if within the scope of the Extension of Admiralty Jurisdiction Act; the Jones Act; or based on injuries to seamen and longshoremen caused by the unseaworthiness of a vessel or its equipment. See Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963). Thus far, however, none of these exceptions to the situs rule for determining maritime jurisdiction have been applied to occurrences involving airplanes, and the crews of airplanes have been specifically deemed outside the scope of the Jones Act. See Marino v. Trawler Emil C., Inc., 3 Av. L. REP. (9 Av. Cas.) ¶ 17,993 (Mass. Sup. Jud. Ct. 1966) (holding that an aerial fish spotter who never served in any capacity on board any of the vessels for which he spotted was not a member of the crew of any such vessel for Jones Act purposes); King v. Pan American World Airways, 270 F.2d 355 (9th Cir. 1959) (personal representatives of a flight supervisor killed in an airplane crash at sea could recover benefits under a state workmen's compensation law, which would not have been possible if the employment had been deemed maritime); and Chance v. United States, 266 F.2d 874 (5th Cir. 1959) (aerial fish spotter not a seaman for the purposes of establishing a maritime lien for wages).

[55] Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921).

that torts arising out of airplane crashes into navigable waters are within the admiralty jurisdiction, and that torts involving airplanes occurring in the air or on land are not. In this area, however, generalizations based on analagous precedents are of dubious worth, and a detailed review of the decisions is in order.

A series of cases in the thirties dealing with the interpretation of criminal statutes and the limitation of liability by owners of airplanes crashing into navigable waters raised considerable doubt as to the true effect of *Reinhardt* and as to whether that decision was authority for the proposition that an airplane crash into navigable waters might be the basis of a maritime tort action.[56] It was not until 1941, and *Choy v. Pan American Airways Co.*,[57] that this doubt was removed and there existed clear judicial precedent for the proposition that the crash of a land-based airplane into navigable waters gives rise to a cause of action enforceable within the admiralty jurisdiction.

*Choy*, as is true of so many other cases in this area, was an action to recover damages for the death of a passenger in an airplane on a transoceanic flight, and was brought pursuant to the federal Death on the High Seas Act. To understand fully the impact of *Choy* and the many succeeding cases, it is important to understand that neither the common law nor the admiralty provided a remedy for wrongful death.[58] To fill this void in the common law, many of the states enacted wrongful death statutes, some of which were deemed applicable to persons dying on the high seas and having a connection with the state.[59] In 1920, to fill further this void and to assure a uniform remedy for the personal representatives of practically all persons dying on the high seas as a result of the wrongful acts of others, Congress enacted the Death on the High Seas Act[60] which, *inter alia*, 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*. . . .[61] (Emphasis added.)

The exclusionary effect of this statute on existing state acts has not yet been conclusively determined.[62] Suffice it to say here that the great majority

[56] See text accompanying notes 24-29 *supra*.

[57] 1941 Am. Mar. Cas. 483 (S.D.N.Y.).

[58] See, *inter alia*, Hess v. United States, 361 U.S. 314 (1960); The Vessel M/V Tungus v. Skovgaard, 358 U.S. 588 (1959); Kernan v. American Dredging Co., 355 U.S. 426 (1958); Levinson v. Deupree, 345 U.S. 648 (1953); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); and The Harrisburg, 119 U.S. 199 (1886), all relating to maritime causes. As to the non-existence of a cause of action for wrongful death at the common law, see Insurance Co. v. Brame, 95 U.S. 754 (1877). See also Comment, *Air Passenger Deaths*, 41 CORNELL L. Q. 243, 245-56 (1956).

[59] The Hamilton, 207 U.S. 398 (1907) (such state statutes could form the basis of a maritime action for wrongful death).

[60] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).

[61] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964).

[62] The legislative history of the Death on the High Seas Act does not make it altogether clear whether the act supersedes the state wrongful death statutes that were formerly applicable within its sphere or merely supplements them. See the debates in the House of Representatives relating to

of actions in tort allegedly caused by the crashing of airplanes into the high seas have, ever since *Choy*, been brought within the admiralty jurisdiction pursuant to the Death on the High Seas Act.[63]

Because the Death on the High Seas Act does not make any reference to "vessels," antecedent decisions holding or implying that airplanes and seaplanes, for purposes of actions in contract, salvage, and proceedings to limit liability, were not vessels within the admiralty jurisdiction did not prevent the *Choy* court from concluding that actions for death occurring as a result of airplane crashes into the high seas are within the admiralty jurisdiction. Similarly, the court was not bothered by those provisions of the Air Commerce Act to the effect that the navigation and shipping laws of the United States shall not be construed as applying to seaplanes, holding that:

> [W]e see no reason to call the Death on the High Seas Act a navigation or a shipping law. The language of the statute makes no reference to the navigation of vessels nor to any feature of their construction or operation.[64]

The reasoning of *Choy* was quickly followed by *Wyman v. Pan American Airways, Inc.*,[65] and the doctrine that actions for wrongful death occurring as a result of airplane crashes into the high seas could be brought in admiralty was well enough established by 1950 that in *Lacey v. L. W. Wiggins Airways, Inc.*[66] the court noted that "the respondent does not deny that this statute [the Death on the High Seas Act] applies to airplane accidents on the high seas." Subsequent cases have made it even

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the act contained in 59 CONG. REC. 4482-87 (1920). The great majority of the courts have not been troubled by this uncertainty, however, and have held that the state acts have been superseded in all instances where the federal act is applicable. See, *inter alia*, Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir.), *cert. denied*, 293 U.S. 577 (1934); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D. Del. 1964); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Batkiewicz v. Seas Shipping Co., 53 F. Supp. 802 (S.D.N.Y. 1943); Choy v. Pan American Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y.); Echavarria v. Atlantic & Caribbean Steam Nav. Co., 10 F. Supp. 677 (E.D.N.Y. 1935); and Dall v. Cosulich Societa Triestina Di Navigazione, 1936 Am. Mar. Cas. 359 (S.D.N.Y. 1928). *But see*, dicta to the contrary in Higa v. Transocean Airlines, 230 F.2d 780, 783 (9th Cir. 1955), *cert. dismissed*, 352 U.S. 802 (1956).

[63] The present majority view is that actions based upon the Death on the High Seas Act are exclusively within the admiralty jurisdiction and relief based upon that act cannot be obtained outside the admiralty jurisdiction pursuant to the saving to suitors clause. See Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957); Turner v. Wilson Line of Mass., Inc., 242 F.2d 414 (1st Cir. 1957); Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (E.D.N.Y. 1965); Scott v. Middle East Airlines Co., S.A., 240 F. Supp. 1 (S.D.N.Y. 1965); Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683 (N.D. Ill. 1964); Cunningham v. Bethlehem Steel Co., 231 F. Supp. 934 (S.D.N.Y. 1964); Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D. Del. 1964); Devlin v. Flying Tiger Lines, Inc., 220 F. Supp. 924 (S.D.N.Y. 1963); Noel v. United Aircraft Corp., 204 F. Supp. 929 (D. Del. 1962); Blumenthal v. United States, 189 F. Supp. 439 (E.D. Pa. 1960); Bergeron v. Koninklujke Luchtvaard Maatschappij, 188 F. Supp. 594 (S.D.N.Y. 1960); Noel v. Linea Aeropostal Venezolana, 144 F. Supp. 359 (S.D.N.Y. 1956); Kunkel v. United States, 140 F. Supp. 591 (S.D. Cal. 1956); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Ifrate v. Compagnie Generale Transatlantique, 106 F. Supp. 619 (S.D.N.Y. 1952); and Gordon v. Reynolds, 10 Cal. Rptr. 73 (Dist. Ct. App. 1960). *But see*, Sierra v. Pan American World Airways, Inc., 107 F. Supp. 519 (D. Puerto Rico 1952); Choy v. Pan American Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y.); Elliott v. Steinfeldt, 254 App. Div. 739, 4 N.Y.S.2d 9 (1938); and Ledet v. United Aircraft Corp., 24 Misc. 2d 1010, 204 N.Y.S.2d 604 (Sup. Ct. 1960), for authority that Death on the High Seas Act causes of action can be brought outside the admiralty jurisdiction.

[64] Choy v. Pan American Airways Co., 1941 Am. Mar. Cas. at 485 (S.D.N.Y.).

[65] 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943).

[66] 95 F. Supp. 916, 917 (D. Mass. 1951).

clearer that actions to recover for the deaths of passengers or crews in an airplane that crashes into the high seas can be brought within the admiralty jurisdiction pursuant to the Death on the High Seas Act.[67] Similarly, actions for personal injuries in such crashes and for deaths or personal injuries occurring as a result of airplane crashes into the navigable territorial waters of a state are also deemed to be within the admiralty jurisdiction even though none of these actions are within the scope of the Death on the High Seas Act.[68] These later cases make it clear that tort actions pertaining to airplanes arising out of occurrances on navigable waters are cognizable in admiralty primarily because they are deemed maritime in nature and not merely because of special legislation such as the Death on the High Seas Act.

The rationale of these cases can hardly be questioned when viewed in the light of precedent. Almost without exception the admiralty courts and the Supreme Court have held that the location of the wrong—*i.e.*, the place where the injury is produced, not necessarily where the injuring force was set in motion—is the sole relevant criteria for determining whether a tort is maritime.[69] If one falling from an extension of land into navigable waters is not deemed to have been injured until landing and, as a consequence, as having a cause of action within the admiralty jurisdiction, it necessarily follows that a passenger in an airplane crashing into the sea in all probability suffered no injury until the impact with navigable waters, and he should also have a maritime cause of action. As stated in *Wilson v. Transocean Airlines*,[70] an action for wrongful death as a result of an airplane crash on the high seas,

> Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred. . . .
>
> In applying the "locality" test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. In so far as appears from the complaint in this action, the wrongful act charged to defendant produced no actionable injury until the aircraft plunged into the sea. The tort occurred upon the high seas within the admiralty jurisdiction. If it is assumed, arguendo, that the airspace over the high seas is without the admiralty jurisdiction, this case is analogous to those cases in which persons or property are

[67] See National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959); Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958); Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683 (N.D. Ill. 1964); Noel v. United Aircraft Corp., 204 F. Supp. 929, 931 (D. Del. 1962) (stating that "respondent does not question the settled view that wrongful death due to airplane accidents over the high seas is a maritime tort falling within admiralty jurisdiction."); Blumenthal v. United States, 189 F. Supp. 439 (E.D. Pa. 1960); Lavello v. Danko, 175 F. Supp. 92 (S.D.N.Y. 1959); King v. Pan American World Airways, Inc., 166 F. Supp. 136, 137 (N.D. Cal. 1958) (holding that "it is established that a suit may be brought in admiralty under the Death on the High Seas Act for a death resulting from the crash of an aircraft upon the high seas."); and Pereira v. Pan American World Airways, Inc., 107 F. Supp. 519 (D. Puerto Rico 1952).

[68] See Weinstein v. Eastern Air Lines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963) (death in territorial waters of a state); Bergeron v. Aero Associates, Inc., 213 F. Supp. 936 (E.D. La. 1963) (both those suffering personal injuries and personal representatives of those dying in a plane crash into the ocean had cause of action in admiralty); and Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954).

[69] See cases cited note 53 *supra*.

[70] 121 F. Supp. 85 (N.D. Cal. 1954).

> precipitated from the land into the sea as the result of a wrongful act or omission. In such cases if there is no impact upon the person or property before they strike the water, it is recognized that the tort occurs upon the water within the admiralty jurisdiction.[71]

*Wilson* did more, however, than simply reiterate and rationalize the holdings that actions based on crashes of aircraft into the high seas are within the admiralty jurisdiction. In the course of its decision, the court raised an interesting question that has not yet been fully resolved—whether torts occurring in the airspace *over* navigable bodies of water or the high seas are also within the admiralty jurisdiction or if recourse therefore must be obtained on some non-maritime basis. Suppose, for example, there is evidence that the airplane on which a plaintiff's decedent was a passenger disintegrated in mid-air before reaching the sea below, or that the injury occurred as a result of the negligent handling of the airplane in the air, and it never did crash into the sea. Should these claims be cognizable within the admiralty jurisdiction under either the Death on the High Seas Act or the general maritime law? The court in *Wilson* did not feel compelled to discuss these matters, but noted that:

> At the beginning of the development of aviation in the United States there was a considerable body of opinion that the entire ocean of air surrounding the earth is within the admiralty jurisdiction, and that consequently all air flight is within the admiralty and maritime jurisdiction of the federal government. This theory never received general acceptance and the federal legislation regulating air navigation has been based on the Commerce Clause of the Constitution. *However, the question whether the airspace over the seas is within the jurisdiction of admiralty has received little attention and remains an open one.* . . . In 1952 Congress expressly declared by statute that any aircraft, belonging to the United States or to any United States citizen or corporation, while in flight above the high seas is within the maritime jurisdiction of the United States for the purposes of the criminal statutes.[72] (Emphasis added.)

The next court to make reference to the problem of whether the Death on the High Seas Act confers admiralty jurisdiction to events occurring in the airspace over the high seas was *Noel v. Linea Aeropostal Venezolana*.[73] There, in an amended complaint, the plaintiffs alleged that their decedent died in the airspace over the high seas as a result of the wrongful acts of the defendant and that, consequently, their exclusive remedy was not, as the defendant asserted, in admiralty pursuant to the Death on the High Seas Act but that they were free to proceed as ordinary civil claimants pursuant to a state wrongful death statute. In dismissing the

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[71] *Id.* at 92.

[72] *Id.* at 91-92. The criminal statute referred to by the court is 62 Stat. 685 (1948), as amended, 66 Stat. 589 (1952), 18 U.S.C. § 7 (1964). Subdivision (5) was added in 1952 to include acts committed on aircraft flying over the high seas and other navigable bodies of water within the maritime criminal jurisdiction. Prior to the amendment of § 7 it had been held that offenses committed in such aircraft were not within the admiralty jurisdiction and, since there were no other applicable criminal sanctions, the crimes went unpunished. See United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950), and United States v. Peoples, 50 F. Supp. 462 (N.D. Cal. 1943).

[73] 154 F. Supp. 162 (S.D.N.Y. 1956).

amended complaint as not being within the civil jurisdiction of the court, the district judge held:

> Neither authority . . . the language of the Statute nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the sea.[74]

In affirming the dismissal of the complaint for "a different and narrower reason,"[75] the Second Circuit found it unnecessary to express an opinion as to whether the Death on the High Seas Act grants a right of action in admiralty for a death caused in the airspace over the oceans, noting that "that problem raises grave constitutional questions as to the permissible scope of admiralty jurisdiction."[76] Just one year later, however, the Second Circuit did not seem so awed by the "grave constitutional questions" it believed the solution of this problem to entail and, in *D'Aleman v. Pan American World Airlines*,[77] met the issue head on. In *D'Aleman* the plaintiff's decedent was a passenger on defendant's airplane traveling from Puerto Rico to New York. In flight, and while over the high seas, the airplane developed engine trouble and the pilot "feathered" the malfunctioning engine, deciding to fly on the remaining three engines. The averments in the complaint were that the decedent became so terrified by the feathering of the engine that he went into a state of shock from which, some four days later in New York, he died. The complaint was based on the Death on the High Seas Act and the court, in the course of holding that the act was applicable, stated:

> The purpose of the act was to create a uniform cause of action where none existed before and which arose beyond the territorial limits of the United States or any State thereof. When the Act was passed (March 30, 1920) the only feasible way to be carried beyond the jurisdiction of any law applicable to wrongful death was by ship. However, with the development of the transoceanic airship the same extraterritorial situation was made possible in the air. The Act was designed to create a cause of action in an area not theretofore under the jurisdiction of any court. The means of transportation into the area is of no importance. The statutory expression "on the high seas" should be capable of expansion to, under, or over, as scientific advances change the methods of travel. The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship should have to sink as a prerequisite.[78]

[74] *Id.* at 163-64.

[75] 247 F.2d 677, 679 (2d Cir. 1957).

[76] *Id.* at 680.

[77] 259 F.2d 493 (2d Cir. 1958). In a concurring opinion Judge Waterman focused upon the constitutional question which had previously bothered the court and which was not mentioned by the majority in *D'Aleman* by stating that he agreed with the majority but would add:

> that Congress acted within the constitutional power granted to it when it created the rights of action in admiralty found in the Death on the High Seas Act; and I would further state that the extension of the rights of action in admiralty therein granted so as to include rights of action for death resulting from events in the air space above the high seas is not an unconstitutional interpretation or an improper extension of that proper grant of jurisdiction.

[78] *Id.* at 495-96.

The court felt that its reasoning was supported by prior decisions in *Choy v. Pan American Airways Co.*[79] and *Noel v. Linea Aeropostal Venezolana,*[80] and concluded by stating:

> The facts of the case now before the court make a direct ruling on the question appropriate. To give to passengers on ships protection of the Act and deny similar rights to passengers in the air would amount to unjustifiable and highly technical discrimination.
>
> We, therefore, now hold that the Death on the High Seas Act grants a right of action in admiralty for death caused by wrongful act, neglect or default occurring in the air space over the high seas and that the trial court properly heard the case in admiralty.[81]

Shortly after *D'Aleman,* the District Court for the District of New Jersey held in *Noel v. Airponents, Inc.,*[82] that a cause of action for a death occurring in an airplane over the high seas that " 'burned, exploded, went out of control and crashed into the sea' " could be brought within the admiralty jurisdiction pursuant to the Death on the High Seas Act. Although not directly discussing whether the Death on the High Seas Act applied to deaths occurring over the high seas, the court was obviously cognizant of the admiralty locality rule and of the fact that the cause of action alleged in the matter before it did not occur "upon" navigable waters, as evidenced by its statement that "it is well established that ordinarily tort liability, and this includes liability for wrongful death, must be determined under the lex loci delicti, *here the airspace over the high seas.*"[83] Nevertheless, it concluded that the action was within the admiralty jurisdiction. Thus, *Noel* seems to buttress the opinion of the Second Circuit in *D'Aleman,* although not making any specific reference thereto.

An easy explanation for *D'Aleman,* and possibly, *Noel,* is hinted at in the court's opinion in *Weinstein v. Eastern Air Lines, Inc.,*[84] where, in the course of advocating a "locality plus" rule for determining maritime tort jurisdiction, the court noted that it believed such a rule to be better "in the absence of statute." And, in a note, the court stated:

> Where jurisdiction is founded on the provisions of § 1 of the Death on the High Seas Act . . . which creates a cause of action for wrongful death "occurring on the high seas beyond a marine league from the shore of any

[79] 1941 Am. Mar. Cas. 483 (S.D.N.Y.).

[80] 154 F. Supp. 162 (S.D.N.Y. 1956).

[81] 259 F.2d at 495-96.

[82] 169 F. Supp. 348, 350 (D.N.J. 1958). See also Noel v. United Aircraft Corp., 204 F. Supp. 929, 931 (D. Del. 1962), where the court noted that "respondent does not question the settled view that wrongful death due to airplane accidents *over* the high seas is a maritime tort falling within admiralty jurisdiction." (Emphasis added.); and Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 454 (S.D.N.Y. 1964) where the court stated: "The sole test for recognition of a maritime tort is whether the injury occurred *over* navigable waters." (Emphasis added.)

From the decisions, it cannot be discerned whether these statements are meant to approve of *D'Aleman* or whether they result from careless use of language. The *Noel* case involved an airplane that burned prior to the crash and, consequently, the court may have been assuming that the death occurred prior to the contact with the water. Such does not, however, seem to be the case in *Montgomery* where the decedents were riding in a balloon that crashed into the ocean as a result of losing air.

[83] Noel v. Airponents, Inc., 169 F. Supp. 348, 350 (D.N.J. 1958). (Emphasis added.)

[84] 203 F. Supp. 430 (E.D. Pa. 1962).

> State," and further confers jurisdiction in admiralty upon the District Courts of the United States to hear and determine such suits, the jurisdiction is based on the statute.[85]

Thus, such reasoning would conclude, admiralty in general has no jurisdiction over the air space above navigable waters but Congress has created a cause of action which can be construed as applying to deaths occurring in such air space and has made it enforceable within the admiralty jurisdiction, just as it later passed a statute making crimes committed in airplanes traversing the oceans punishable by statutes dealing with crimes abroad vessels upon the high seas.[86] Without commenting on the soundness of this reasoning, it is noted that it has not been adopted by subsequent decisions and remains merely an inference that can be derived from a reading of the lower court's opinion in *Weinstein*, a decision that has since been reversed.[87]

A still further extension of the *D'Aleman* doctrine was made in *Notarian v. Trans World Airlines, Inc.*[88] This case, unlike the great majority of its predecessors, did not involve the death of a passenger in an aircraft but was instead concerned with a claim for compensation for injuries occasioned by a passenger when violently jolted about during a transoceanic flight. The complaint was filed in admiralty and, in denying a motion to dismiss, the court held:

> [I]t is obvious that contact either with the land or with the water over which the plane is flying is not a jurisdictional requisite for the bringing of an action where remedies are otherwise provided. . . .
>
> Since it appears here that the wife-libellant was injured in the air space over the Atlantic Ocean, admiralty is the proper forum for an adjudication of this action.[89]

In arriving at this decision, the court relied heavily upon *D'Aleman* and the other wrongful death cases heretofore discussed and, additionally, upon the "perpendicular plane theory," analogizing the case before it with cases holding that the one who owns the surface also owns the air space above it. The court also quoted extensively from *United States v. Causby*[90] where, in the course of holding that the owner of a chicken farm could recover compensation for damage to his chickens caused by flying airplanes, the Supreme Court held: "The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate."

While this analogy leaves something to be desired, since unlike the *Causby* case, the injury in *Notarian* was inflicted in the air and not merely set in motion there, there is no rebutting the fact that an accident in the

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[85] *Id.* at 433.

[86] 66 Stat. 587 (1948), 18 U.S.C. § 7 (1964).

[87] The district court's opinion in *Weinstein* was reversed, 316 F. 2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[88] 244 F. Supp. 874 (W.D. Pa. 1965). For a favorable comment on this decision see Note, 32 J. AIR L. & COM. 282 (1966).

[89] *Id.* at 877.

[90] 328 U.S. 256, 262 (1946).

airspace over, for example, Arizona has been deemed for conflict of laws purposes to have occurred in Arizona and, by the same reasoning, it could easily be rationalized that an accident in the airspace over the ocean is deemed to have occurred in—or on—the high seas. Thus, whether all accidents occurring in the airspace over navigable bodies of water will be deemed within the admiralty jurisdiction or whether such jurisdiction will be limited to causes within the scope of the Death on the High Seas Act, awaits further judicial or legislative comment. Until such comment is forthcoming, however, *Notarian* remains valid authority for the extension of the admiralty jurisdiction in tort to the airspace above all navigable waters.

The scope of the Death on the High Seas Act has been strictly limited to torts occurring on or, more recently, over the high seas. Similarly, permissible causes of action for personal injury or death occurring on or resulting out of crashes of aircraft and which are outside the scope of the federal death act have all occurred over or in a navigable body of water. However, the fact that the cause of the injury or death may be traceable to a negligent act or omission occurring over such waters is of no consequence if the impact occurred after the aircraft passed over or onto land masses. Illustrative of this is *Pearson v. Northeast Airlines, Inc.*,[91] where the court, in granting a motion for summary judgment dismissing a libel for lack of admiralty jurisdiction, noted that the airplane in which the decedent was a passenger crashed on Nantucket Island, and concluded that it made no difference that the purported negligence occurred while the flight was at sea. The court further noted that the Admiralty Extension Act did not change the result in any way.[92] Similarly, at least thus far, the crews of airplanes have not been deemed "seamen" within the scope of the Jones Act nor for the purpose of being entitled to maintenance and cure nor for the purpose of bringing actions based on the maritime doctrine of unseaworthiness. And this notwithstanding the scheduled flight on which they are employed is almost entirely over navigable waters.[93] Thus, in the limited area of maritime tort law dealing with airplanes, the shore line still remains a clearly delineated boundary in no way affected by the many jurisdictional inroads applicable to vessels and their crews.[94]

### B. *The Effect Of The Warsaw Convention*

The above cases clearly illustrate that the courts have construed certain torts occurring aboard airplanes on or over navigable waters as being within the admiralty jurisdiction, and that for the most part there is authority which can be used to justify the extension of maritime principles to such occurrances. Before it can rationally be determined whether such an extension is desirable, however, certain other factors must be con-

[91] 199 F. Supp. 538 (S.D.N.Y. 1961).

[92] Had the decedent suffered some injury leading to death while in the air over the ocean, it is likely that the court would have permitted recovery notwithstanding the subsequent crash occurred on the land. See D'Aleman v. Pan American World Airlines, Inc., 259 F.2d 493 (2d Cir. 1958).

[93] See note 54 *supra*.

[94] *Ibid.*

sidered, one of the most significant of which is the Warsaw Convention.[95] The Warsaw Convention was concluded in 1929, and was adhered to by the United States in 1934. Basically, if the airline has complied with the mandates of the Convention, the provisions of the Convention constitute the only remedy against the airline available to passengers and shippers of cargo on international flights in airplanes of member nations. "International transportation," as defined in the convention, is:

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.[96]

On all such flights or shipments there is a rebuttable presumption that any injury, loss, or death occurred as a result of the negligence of the carrier and, in the absence of a showing of wilful misconduct, recovery against the carrier is limited to a maximum of $8,300. The Convention further provides a two-year statute of limitation and sets forth venue requirements which have been construed as "referring only to the nation in which the suit may be brought but not to a particular court within a nation."[97] Since its promulgation, the Convention has been ratified or adhered to by over ninety countries, including most of the nations of the world actively participating in international air commerce. Notwithstanding the fact that the United States is one of these countries, the Convention has never been universally acclaimed here because of the low limitations it imposes, and was in fact denounced by the United States in 1965, to be effective 15 May 1966.[98]

To prevent the United States from following through with its announced intention of withdrawing its adherence to the Convention, an agreement was entered into between the United States and a group of foreign and domestic air carriers providing the major portion of international air carriage to and from the United States. This agreement not only raised the liability limitations of the signatory carriers to $75,000

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[95] Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 13 Feb. 1933, 49 Stat. 3000, T.S. No. 876 (effective date 29 Oct. 1934).

[96] Warsaw Convention, art. 1.

[97] Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683, 686 (N.D. Ill. 1964). Article 28(1) of the Convention provides that

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

*Pardonnet* and other federal court cases make it clear that, in the United States, these restrictions are only on a national basis and an action under the Convention within the admiralty jurisdiction, for instance, may be brought any place where the defendant can be served or where his goods or credits can be garnished or attached notwithstanding that neither of the parties is domiciled in such district or has a place of business in such district.

See also Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965).

[98] Protocol to Amend the Warsaw Convention (The Hague Protocol), 28 Sept. 1955, 2 Av. L. REP. ¶ 21,641.01; 1955 U.S. & CAN. AV. REP. 521.

but, additionally, provided for absolute liability of such carriers in the event of any death, injury, or loss. The agreement is applicable only "to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place."[99] The agreement became effective in May, 1966, and as a result thereof, the United States has withdrawn its notice of denunciation and is still a party to the Convention, as supplemented by the independent agreement with the major air carriers.

Regardless of whether actions involving aircraft on flights within the scope of the Warsaw Convention are based on the Death on the High Seas Act, the general maritime law, a state statute, or the common law, the limitation provisions of the Convention are held to apply. Thus, it would appear that it is to a large degree unnecessary to extend the provisions of the Death on the High Seas Act or the general maritime law to actions involving injuries or deaths occurring on airplanes since an adequate, and indeed exclusive, remedy in the Warsaw Convention already exists in a great many instances.[100] Whether this is a valid assumption, however, has never been clear since the Convention has been deemed either not self-executing or as creating no new substantive rights since its adoption by the United States. The early cases construed the Convention as being non self-executing and, therefore, inoperative in the absence of independent enabling legislation. Illustrative of this is *Choy v. Pan American Airways Co.*[101] where the court, in an action brought pursuant to the Death on the High Seas Act, held:

> Nor do we think the claim under the Warsaw Convention should be insisted upon. There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who may be thought to be injured by a death and, though the liability stated in Article 17 is a part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance, which it has not as yet received.[102]

*Choy* was followed by *Wyman v. Pan American Airways, Inc.*[103] where the court held: "The right to any recovery in this action must depend on some statute. . . ." But, although denying recovery of the interest sought by the plaintiff because the maritime law provided no recovery therefor and not elaborating on the self-executing aspects of the Warsaw Convention, the *Wyman* court did note that the rights of the parties were

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[99] *Ibid.* The protocol referred to is the 1955 Hague Protocol to the Warsaw Conevntion, which has not been adopted by the United States.

[100] The Warsaw Convention is applicable to all actions seeking recovery for personal injury or death occurring on airplanes in international flight, regardless of the situs of the accident. Thus, the great bulk of transoceanic air carriage and most cases within the scope of the Death on the High Seas Act would fall within the ambit of the Convention.

The Convention does not apply, of course, to causes of action not arising out of international air carriage and, consequently, there are numerous incidents occurring in or over navigable waters which are outside its scope.

[101] Choy v. Pan American Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y.).

[102] *Id.* at 487-88.

[103] Wyman v. Pan American Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420, 423 (Sup. Ct. 1943).

fixed by the Convention, notwithstanding the apparent lack of any enabling legislation such as was thought necessary in *Choy*. A year-and-a-half later, in *Indemnity Ins. Co. of No. America v. Pan American Airways, Inc.*,[104] the self-executing status of the Convention was again squarely before the court in an action for indemnity brought by a compensation insurance carrier who had paid death benefits to the estate of an individual dying in an air crash into Lisbon harbor. One of the defenses asserted by the defendant airline was that the Convention was inoperative because it was not self-executing and had never been implemented in the United States by enabling legislation. In dismissing this contention, Judge Rifkind stated:

> Whether a treaty is self-executing or requires implementing legislation depends upon its terms, whether they call for further action or whether they are enforceable without legislation. . . . As I read the treaty and particularly the provisions pleaded in the answer I construe them to be self-executing.

Similarly, in *Garcia v. Pan American Airways, Inc.*,[105] the court stated that:

> there is no substance to the contentions of plaintiffs that the Warsaw Convention is not self-executing and so unenforceable, and that it is inapplicable where both passenger and operator are citizens of the same nation. The provisions of the treaty do not require implementation and may be enforced in the same manner as if enacted by statute.

The self-executing status of the Convention, once so controversial, was taken as settled in *Noel v. Linea Aeropostal Venezolana*,[106] an action for a death occurring when an aircraft crashed into the high seas. There the plaintiff, attempting to bring her action outside the scope of the admiralty jurisdiction and thus benefit from the right to a jury trial and the then-broader discovery proceedings applicable to non-maritime civil actions, alleged that the Warsaw Convention created a separate cause of action which could be brought outside the admiralty jurisdiction. The court first disposed of the contention that the Warsaw Convention is not self-executing by stating that:

> While there was at first some doubt as to whether the Convention was self-executing to any extent . . . there is no doubt at this time that, at least insofar as the Convention creates a rebuttable presumption of liability upon the happening of the accident, Article 17, and a limitation thereof except upon the showing of wilful misconduct, Article 25, that it is self-executing.[107]

The court then went on to hold that "it is obvious, however, that the Convention intended to leave much to the law of the forum," and concluded that the lex loci delicti was to be applied by the forum even though the Warsaw Convention was applicable. Thus, continued the court, even though the Convention is by now clearly believed to be self-executing, it is not deemed to create any new substantive rights and is only to be

[104] 58 F .Supp. 338, 340 (S.D.N.Y. 1944).
[105] 269 App. Div. 287, 55 N.Y.S.2d 317, 322 (1945).
[106] 144 F. Supp. 359 (S.D.N.Y. 1956).
[107] *Id.* at 360.

applied where applicable in actions commenced under some other statutory or common law right. In affirming this decision the Second Circuit held that:

> [W]e agree with our prior decision . . . that the Convention did not create an independent right of action. As Judge Leibell pointed out, Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. As one authority has stated, the purpose of the Convention was only "to effect a uniformity of procedure and remedies". . . .
>
> Thus, regardless of whether the Federal Death on the High Seas Act provides a remedy, Article 17 does not.[108]

To the same effect, see *Notarian v. Trans World Airlines, Inc.*[109]

There is no rational basis by which the reasoning of *Noel* and *Notarian*, in concluding that the Convention does not create an independent cause of action, can be sustained, especially in view of the latest supplemental agreement to which the United States is a party providing for absolute liability. This is most certainly a "new substantive right" which did not exist under any of the existing statutes or the general legal concepts applicable to air crashes, whether they were at sea or on or over dry land. Furthermore, it is doubtful whether a court would now be willing to hold that the Convention created no new substantive right if faced with determining the rights of a passenger injured or killed in an international flight within the scope of the Convention whose cause of action does not fall under the aegis of some other relief-providing law. Take, for instance, the hypothetical case of a passenger on a trans-continental flight originating or terminating in the United States and which crashes into the mainland of a nation where there is no wrongful death act. Assume further that no other jurisdiction which does have a wrongful death act has sufficient connection with or interest in the action to cause its law to apply. It seems as inconceivable as it would be unjust that any court would preclude recovery on an action against the carrier brought pursuant to the Warsaw Convention in such a case just because there is no applicable principle of general common law, maritime law, or statutory law upon which the claim can be based when there is a valid and binding agreement providing for absolute liability up to a maximum of $75,000 to provide compensation for a person so injured or killed. Whatever small force the statement that the Convention "creates no new substantive right" may have had prior to the 1966 agreement today seems lost. Logic, reason, and analogous legal precedence compel a contrary result and a holding that the Convention, as recently supplemented, does create a substantive right even though it looks to the forum subsequently chosen to provide much of the procedural mechanization for enforcing that right.

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[108] Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679-80 (2d Cir. 1957). See also Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954).

[109] 244 F. Supp. 874 (W.D. Pa. 1965).

Once it is accepted that the Warsaw Convention creates new substantive rights that can be enforced independently of any other statutes or principles of common or maritime law, the force of many of the best arguments for the extension of the Death on the High Seas Act and the general maritime law to incidents in the air space over navigable waters and to occurrences involving aircraft generally is greatly diminished. The primary advantages alleged to occur by extending the federal maritime law to such incidents are that it provides some measure of uniformity, which is not present if recovery for such accidents depends upon the construction given to the various state laws and statutes that may otherwise be applicable; and that it provides a remedy where, in some instances, none was previously believed to exist. Since many of the airplane cases—though, admittedly, not all[110]—to which the Death on the High Seas Act or the principles of general maritime law have been deemed applicable are also within the scope of the Warsaw Convention, the Convention is also in a position to offer some measure of uniformity for causes of action arising as a result of incidents on airplanes on or over the high seas. Furthermore, since the provisions of the Convention apply both over land and water, courts applying it are not burdened with the artificial, and in airplane cases, at least, most irrelevant, distinctions between injuries and deaths on international flights occurring over land masses or over navigable waters, with different rules of law applicable in each instance. Coupled with this is the blunt fact that applicability of maritime principles to torts connected with planes has not provided all that much uniformity. Deaths occurring on the high seas are, in the opinion of at least one important jurisdiction, still enforceable pursuant to the provisions of state wrongful death statutes, although, admittedly, the majority view seems to be that the Death on the High Seas Act provides an exclusive remedy in such cases.[111] Furthermore, if the death occurs within three miles of the coast of any state, that state's wrongful death laws (or the wrongful death laws of the state whose substantive law may be deemed to apply if there is a conflict of laws problem) and not any uniform federal laws are applicable. If the injury or death occurs while the plane is flying over a land mass there is an even greater possibility that many states can enforce local laws, and no uniform system presently is believed to exist in such cases.[112] None of this indicates that any great degree of uniformity has in fact been achieved by this somewhat forced application of maritime law to matters occurring in the air space over or upon navigable waters, and what uniformity that has been achieved is dependent upon artificial land-sea distinctions that often have no real relevance or significance. While

[110] See note 100 *supra.*

[111] See the discussion in note 62 *supra.*

[112] About the only unanimity of opinion currently extant in determining what law should be applied to torts with multi-state connections is that the vested rights approach of the old RESTATEMENT, CONFLICT OF LAWS § 377 (1934), is no longer a valid guide. For illustrations of the more modern approaches see CAVERS, THE CHOICE-OF-LAW PROCESS (1965) (wherein the views of several current scholars are examined); and RESTATEMENT (SECOND) CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

the Convention is also subject to such criticisms since it does not apply to all flights, but only to "international" flights, it at least is a covenant created to deal specifically with air travel, is not burdened with insignificant geographical distinctions, and has not been made applicable to aircraft by judicially created and somewhat illogical extensions of maritime principles.

A second reason sometimes given as support for the extension of maritime principles into the air—that they will provide remedies where none previously existed—is also of doubtful validity today. Actions for personal injuries have always been cognizable at common law, and maritime principles are not necessary to preserve such rights no matter where the injury occurs.[113] Although there are no common law remedies for wrongful death, most states have remedied this situation by legislation and the Warsaw Convention also provides a uniform remedy in those cases to which it is applicable. Although it is conceivable that there will be instances which would be within a broad interpretation of the Death on the High Seas Act which are not within the scope of either the Convention or a state statute, it is believed that the forced application of admiralty law to aircraft should be made on a sounder basis than that it may, in some speculative situation, provide a remedy where none otherwise exists. Since a sounder basis for such an extension does not appear to exist, it is believed that the existence of the Warsaw Convention, and its interpretation as creating substantive rights, provides a compelling reason for the proposition that admiralty principles should not be extended to torts occurring in the air space over navigable waters nor to airplane crashes into the high seas or other bodies of navigable waters.

### C. *Suggested Solutions*

Airplanes, whether land based or equipped with pontoons for landing and take-off from bodies of navigable water, present a special problem in determining maritime tort jurisdiction. As has been previously discussed, the courts have almost unanimously concluded that actions for deaths and injuries occasioned as the result of some negligent act or omission causing a plane to crash into a body of navigable water are within the admiralty jurisdiction. It is difficult to find fault with these decisions since such a result inevitably follows an application of the strict locality rule for determining maritime tort jurisdiction, and there is a plethora of precedence making that rule the only relevant criteria in this area.[114] Moreover, the recent trend has quite obviously been to extend the admiralty jurisdiction to torts occurring in the airspace over bodies of navigable waters, whether the action is based on the Death on the High Seas Act or on the

[113] With the demise of the vested rights approach of the old Restatement of Conflict of Laws (which applied the law of the place where the injury occurred) and the emphasis currently placed upon such factors as the governmental interest of the forum chosen and the relationship of the occurrence to the jurisdiction whose laws are asserted as governing, it seems unlikely that some remedy will not be available to one injured in an airplane on or over navigable waters notwithstanding the inapplicability of maritime law. See note 112 *supra*.

[114] See note 53 *supra*.

principles of the general maritime law.[115] And this latest extension, though not so inevitable, can be supported with logical argument and analogous precedent. The question then is not so much whether torts occurring upon or in the air space over navigable bodies of water *can* be included within the admiralty jurisdiction as whether they *should* be so included.

Undoubtedly, airplanes have many of the features of sea-going vessels that prompted the formulation of a separate set of laws to govern such vessels, laws that are now referred to as the admiralty. Like vessels, airplanes and their crews have great mobility and are by their very nature transient. They travel to many parts of the globe where their owners may not be subject to service of process and, consequently, a valid argument can be made for extending many of the traditional maritime processes and procedures to such instruments of commerce and carriage. It is, indeed, not too far-fetched to analogize the navigation of the air space above all portions of the earth with the navigation of the seas and conclude that similar laws should govern both. However, it was early concluded that the same laws should not govern both water vessels and aircraft because, although the similarities are great, the differences are even greater. Ships, by their physical nature, are relegated solely to the seas and to the great inland lakes and waterways of the world. The shores of these waters form natural boundaries, beyond which they cannot operate. Airplanes, on the other hand, are not limited by any such physical boundaries and can and do operate over both land and navigable bodies of water. Thus, application of a system of laws geared only to commerce and navigation upon navigable waters will of necessity cause meaningless distinctions if applied to aircraft unhindered by such geographical boundaries.

What possible rational basis is there for holding that the personal representative of a passenger killed in the crash of an airplane traveling from Shannon, Ireland to Logan Field in Boston has a cause of action within the admiralty jurisdiction if the plane goes down three miles from shore; may have a cause of action within the admiralty jurisdiction if the plane goes down within an area circumscribed by the shore and the three mile limit; and will not have a cause of action within the admiralty jurisdiction if the plane managed to remain airborne until reaching the Massachusetts coast? And this notwithstanding that in all instances the plane may have developed engine trouble or been the victim of pilot error at an identical site far out over the Atlantic. What possible justification is there for holding that where the crash occurs on the mainland the personal representative of the ill-fated passenger may be met with such defenses as contributory negligence and assumption of risk; may not have available to him the right to garnish or attach assets and goods of the defendant; will be precluded from taking depositions *de bene esse;* will be compelled to commence his action only in the state courts of the representative's domicile or, if there is an independent ground of federal juris-

[115] See D'Aleman v. Pan American World Airlines, Inc., 259 F.2d 493 (2d Cir. 1958); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965).

diction, in those jurisdictions permitted by Section 1391 of the Judicial Code;[116] and, in general, will be bound by all of the rules and restrictions applicable to ordinary non-maritime civil actions in the forum chosen, while an action brought on behalf of a decendent aboard a plane crashing into navigable waters either within or beyond the three mile limit will or, at the personal representative's election, may, be governed by a completely different set of substantive and procedural rules which could materially alter the ultimate outcome of the litigation? Where the passenger is only injured rather than killed, the same illogical distinctions apply with the exception that the only line of demarcation then applicable is the shore line, with the three mile limit becoming an irrelevant factor. In both death and injury cases, however, it is evident that while distinctions based on locality often are in fact quite relevant where water vessels are concerned, they entirely lose their significance where aircraft, which are not geographically restrained, are concerned. Consequently, the use of such distinctions to ascertain whether admiralty jurisdiction exists is, theoretically, patently unsound.

Even more problems are attendant to a determination of the feasibility of extending admiralty jurisdiction to torts occurring in the airspace over navigable waters. If this extension is not made and the courts continue to hold that tort actions based on airplane crashes into navigable waters are maritime, it becomes necessary to determine whether the injuries or deaths occurred in the air or at the moment of impact—a distinction that, in many cases, could prove impossible to determine, and which reason dictates should be of no relevance.[117] And, if the extension is made, the distinctions that may have to be made, at least in non-crash cases, may be even more difficult to ascertain since airplanes often, and within fractions of a minute, fly over changing patterns of land and water. Thus, even if the injury or death is immediately discovered, the precise location at which it occurred may prove difficult to ascertain.

In addition to these practical difficulties, the extension of the admiralty jurisdiction into the airspace over navigable waters raises "grave constitutional questions."[118] Notwithstanding that the power of Congress to expand the admiralty jurisdiction is sufficiently broad to enable it to cope with the changing circumstances of a modern world, this power is restricted by the requirement that it not be exercised in such a way that it transcends the traditional concepts of admiralty jurisdiction as they existed in the general maritime law at the time the Constitution was conceived.[119] And, except for the concurring opinion in *D'Aleman v. Pan American World Airlines*,[120] the constitutionality of the extension of admiralty juris-

[116] 62 Stat. 935 (1948), as amended, 77 Stat. 476 (1963), 28 U.S.C. § 1391 (1964). For a discussion of this section see 7A MOORE, FEDERAL PRACTICE at JC-575-84 (2d ed. 1966).

[117] For a discussion of an analogous problem caused by death or injury in an airplane at an unknown place and the presumptions flowing from such an occurrence see Comment, *Air Passenger Deaths*, 41 CORNELL L. Q. 243 (1956).

[118] Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957).

[119] Panama R.R. v. Johnson, 264 U.S. 375 (1924).

[120] D'Aleman v. Pan American World Airlines, Inc., 259 F.2d 493 (2d Cir. 1958).

diction into the air space has never been affirmatively resolved by a court. It must be remembered that, by holding such air space to be within the admiralty jurisdiction, the court enables a plaintiff who elects to bring his claim within the admiralty jurisdiction to prevent the defendant from asserting a right to a jury trial, a right to which the defendant would otherwise be entitled.[121] Similarly, a plaintiff seeking compensation for a death occurring in the air space over the high seas will be required in most jurisdictions, if his cause of action is deemed maritime, to proceed in admiralty pursuant to the Death on the High Seas Act and will lose the right he might otherwise have to make use of an applicable state wrongful death statute. Arguably, this could constitute a denial of due process or a violation of the full faith and credit clause of the Constitution. Unless and until these and perhaps other issues are determined by the Supreme Court, there is a very distinct possibility that the extension of the admiralty jurisdiction into the air space over the high seas and other bodies of navigable waters may deprive one or both of the litigants of his constitutional rights. While the possible infringement of a constitutional right is a chance that all courts are warranted to and, in fact, must take in certain instances compelled by the situation, there seems no justification for taking such chances in this area where the distinctions relied on to bring a cause within the admiralty jurisdiction are in reality meaningless, arbitrary, and unsound.

A review of this area clearly indicates that the most weighty alleged justification for the extension of admiralty principles to occurrences involving the flight of airplanes over navigable bodies of water is that such an extension adds uniformity to an area of law previously hopelessly confused by a hodge-podge of state statutes and laws which often resulted in unfair and widely divergent results. Take, for instance, the hypothetical case of personal representatives of passengers sitting side-by-side on the same trans-oceanic flight which crashes into the Atlantic. Were the maritime law or the Warsaw Convention not applicable, 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. Once the relevant law is determined for each passenger, it might be discovered that the law applicable to one passenger provides no remedy for wrongful death and that, as a consequence, his personal representatives have no recourse against a negligent airline or manufacturer. On the other hand, the law applicable to his traveling companion may provide a remedy for wrongful death but limit recovery to $10,000. The claim of the third traveling companion, moreover, may be within the scope of a wrongful death statute which contains no statutory limitations, thus permitting a full recovery by the personal representative on behalf of the statutory beneficiaries. Unconscionable results like these,

[121] See 7A MOORE, FEDERAL PRACTICE ¶ 59 [3] (2d ed. 1966) for a discussion of the right to a jury trial in an action within the admiralty jurisdiction.

to a large measure, prompted the application of the admiralty principles—particularly the principles of the Death on the High Seas Act—to air flights over navigable bodies of water. And it cannot be denied that to a limited extent the application of the admiralty principles, particularly those of the Death on the High Seas Act, did remedy some of the unconscionable results alluded to. They have not, however, proved to be a complete panacea.

Notwithstanding the application of admiralty principles, personal representatives of decedents dying in airplane crashes in navigable waters are still subject to the interposition of various state statutes depending upon whether the crash occurred within or without a three mile line separating the high seas from territorial waters of a state. Moreover, in some jurisdictions, the state law may be deemed applicable regardless of where the crash occurred.[122] Similarly, in both death and injury cases the result will differ if the incident occurred on or over land or water, notwithstanding that the plane may have been flying at an altitude of several thousand feet and its precise location at the moment the injury was sustained was in no way relevant to the tort. And, to compound further the situation, the rights of passengers sitting adjacent to each other may differ if one is on a lap of an international journey, and thereby subject to the provisions of the Warsaw Convention, and the other, though traveling over the high seas, embarked and departed, or intended to depart, within the territory of the same nation. Thus, the available rights and remedies for any given tort occurring on or over the high seas or other bodies of navigable waters or on or over land immediately adjacent thereto may be far from uniform. And the fact that the remedies may be "more nearly uniform" than they would be if maritime principles were not applicable to at least a limited extent does not alone justify the application of such principles.

Air commerce is too important an aspect of the present-day commercial world to leave to chance, governed by a hodge-podge of maritime and non-maritime laws, or both, depending upon such a tenuous and irrelevant distinction as the geographical character and location of the underlying terrain. Just as the admiralty has, from ancient times, been found in need of special legal principles and procedures especially suited to its peculiarities, so too should air commerce be guided by a set of rules and principles especially adapted to the specific problems it creates. This is especially true now that such craft may exceed by many times the speed of sound and rapidly approach the point where they are no longer bound by the earth's gravitational pull. The forced application of the maritime laws, in no way tailored to meet the problems of such aircraft, while solving some of the problems created by an indiscriminate application of the various laws of the land, creates other problems causing results equally unconscionable. Congress, recognizing the special problems of the airplane, has enacted much legislation directed thereto.[123] It is submitted that Congress should

[122] See note 63 *supra*.
[123] See note 17 *supra* and accompanying text.

further bring such flights within the purview of a uniform set of laws applicable to both land and ocean flights, and that liability for torts occurring as a result of interstate and international air carriage or transportation should not be left to a morass of irrelevant factors predicated on the geographical character of the underlying terrain or the distance the incident occurred from the nearest shore. Until Congress so acts, the courts would do well not to further extend the principles of the admiralty tort jurisdiction to airplanes and thus risk giving greater precedential strength to a forced and totally unwarranted analogy.[124]

[124] See Sweeney, *Is Special Aviation Liability Legislation Essential?* (pts. 1 & 2), 19 J. AIR L. & COM. 166, 317 (1952).