JURISDICTIONAL SPLASHDOWN: SHOULD AVIATION TORTS FIND SOLACE IN ADMIRALTY?

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I. INTRODUCTION

ON A TRAGIC Friday morning in July 1983, a Waterfront Airways Cessna seaplane collided with a Bell police helicopter six hundred feet over Brooklyn, New York.¹ The impact severed the tail section of the seaplane and tore off the rotor blades on the helicopter. Left without its stabilizing rear rotor, the helicopter pitched violently into an abandoned apartment building, killing the two policemen on board as it plummeted to the ground. Two of the seaplane’s passengers were luckier. The dark waters of New York Harbor cushioned its crash, preventing an explosion and allowing them to escape.

Joseph Stamler and Eileen McCarthy, commuters traveling aboard the seaplane, lived through the nightmarish incident. The two Wall Street investment bankers frequently took the Waterfront Airways charter between Highlands, New Jersey, and the East River area of Wall Street as an alternative to the crowded New York streets.² The crash of the seaplane, which also killed its pilot and a third passenger, left Mr. Stamler with head lacerations and shattered vertebrae. Ms. McCarthy suffered fractured ribs, a broken pelvis, and internal bleeding. Nevertheless, in light of the deaths involved, they considered themselves fortunate.

What is unfortunate was that the complexities of the federal jurisdictional system eventually left Mr. Stamler and

² According to the New York Metropolitan Area Transportation Department, there were about 8000 commuter seaplane flights in and out of the New York City area each year. Id.
Ms. McCarthy without recourse in the federal district courts. No clear legal framework has ever provided for federal jurisdiction over aviation torts. Instead, cases involving aviation torts find solace in federal courts via diversity or admiralty jurisdiction. Furthermore, many suits involving aircraft disasters may fall under federal admiralty jurisdiction by virtue of the Death on the High Seas Act (DOHSA). Successfully asserting admiralty jurisdiction

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3 See City of New York v. Waterfront Airways, 620 F. Supp. 411 (D.C.N.Y. 1985), discussed infra at notes 82-89 and accompanying text. Since the plaintiff passengers and defendant Waterfront Airways were all New Jersey residents, no diversity jurisdiction existed and any federal jurisdiction had to be predicated upon admiralty jurisdiction. Lack of admiralty jurisdiction became grounds for dismissal of the suit. Id.


5 Federal courts of the United States have jurisdiction extending "to all Cases... of admiralty and Maritime Jurisdiction... [and] to Controversies between two or more States... [or] between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. A background of admiralty law and the benefits surrounding its application are discussed in part II.A., infra. Plaintiffs and defendants may both find benefits in filing cases under the admiralty label. Id.

Although this comment concerns itself primarily with admiralty/aviation jurisdictional issues, the problems of finding in personal jurisdiction when out-of-state aviation corporations are involved deserve some mention. Aviation suits commonly incorporate personal jurisdiction issues when litigated in state courts. See Randal R. Craft, Jr., Overview of Recent Developments Affecting General Aviation Accident Litigation, in Aircraft Crash Litigation 1984, 41 (PLI Litig. & Admin. Practice Course Handbook Series No. 267, 1984). Indeed, two of the landmark cases elaborating on the in personam issue involve aircraft manufacturers. Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (holding that Texas could not assert general jurisdiction over a Colombian helicopter company since the mere sending of Colombian employees to Texas for temporary training did not constitute continuous and systematic general business contacts); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (holding that choice of law rules should not be given weight in an exercise of discretion for a forum non conveniens request). Such complex issues only further illustrate the need for uniformity in the aviation litigation context. See discussion at part IV, infra.

6 Section 761 of the Death on the High Seas Act 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, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against
gives plaintiffs substantive and procedural advantages not otherwise available in either federal or state courts when other jurisdictional grounds are pled. Statutes such as DOHSA can provide a bright-line basis for finding appropriate jurisdiction in admiralty.

In other circumstances, the line blurs considerably. When aviation torts occur within territorial waters, as in the Waterfront Airways accident, proper jurisdiction becomes the proverbial "shot in the dark." In the absence of specific statutory legislation providing for federal jurisdiction over aviation issues, the federal courts have relied on a confusing array of tests to determine whether admiralty provisions should control. Plaintiffs such as Mr. Stamler and Ms. Mc-

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7 See notes 17-21 and accompanying text.

8 It is important to distinguish between the DOHSA remedies, which constitute a statutory action in admiralty, and common-law maritime remedies. Prior to the 1920 enactment of DOHSA, the general maritime law in the United States offered no remedy for wrongful death (as stated in The Harrisburg, 119 U.S. 199 (1886)). Claims for wrongful death remedies may therefore be predicated only upon statutory authority encompassing general admiralty law, rather than admiralty per se. See part III.A., infra.


The confusion surrounding proper admiralty jurisdiction prevails, quite understandably, in traditional maritime contexts. While this comment concentrates on aviation issues, many commentators have examined the influence of recent federal cases that have redefined the overall requirements for admiralty jurisdiction. See Jeffrey L. Raizner, Note, Missing the Boat — Another Failed Attempt to Define Admiralty Tort Jurisdiction: Sisson v. Ruby, 29 HOUS. L. REV. 735 (1992); Joseph F. Smith, Jr., Choice of Law Analysis: The Solution to the Admiralty Jurisdictional Dilemma, 14 TUL. MAR. L.J. 1 (1989); Charles H. Livaudais, Cruising into Federal Court: The Availability of Federal Admiralty Jurisdiction for Pleasure Craft Tort Cases after Foremost Insurance Co. v. Richardson, 12 TUL. MAR. L.J. 347 (1988); Jonathan M. Gutoff, Comment, Admiralty
Carthy consequently lose control over their lawsuits by virtue of the jurisdictional mess over aviation in admiralty.

This comment addresses the problems and issues that arise when attempting to assert admiralty jurisdiction over aviation torts. Part II briefly summarizes the history of admiralty law and its accompanying benefits. This section includes a discussion of *Executive Jet v. City of Cleveland,* the 1972 Supreme Court case which sought to provide a workable standard for the scope of admiralty jurisdiction. Part III analyzes the most recent examples of case law interpreting *Executive Jet* and will illustrate its continuing problems. Part IV of this comment explores major issues arising following the implementation of the *Executive Jet* standard. This section addresses the problems of DOHSA and state law pre-emption, and also a newer issue concerning the viability of non-wrongful death suits involving aviation torts, filed under the purported reach of admiralty. Part V then discusses possible Congressional action on proposed statutory provisions allowing federal jurisdiction, independent from admiralty, over all related aviation torts. In conclusion, this comment contends that the forum of aircraft-related litigation would greatly benefit, in both efficiency and predictability, from a statutory scheme of federal jurisdiction over aviation torts.

II. HISTORICAL BACKGROUND OF ADMIRALTY JURISDICTION

A. Why Admiralty?

The unique circumstances surrounding maritime commerce led to the development of a separate set of laws and rules governing transportation in navigable waters. Congress first extended jurisdiction over admiralty issues to the

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*Jurisdiction Over Asbestos Torts: Unknotting the Tangled Fibers, 54 U. Chi. L. Rev. 312 (1987).*

*409 U.S. 249 (1972).*

federal courts through section 9 of the Judiciary Act of 1789.\textsuperscript{12} For the first 175 years following the passage of section 9, district courts kept such cases apart from other areas of jurisdiction, and the "admiralty docket" functioned under its own procedural workings.\textsuperscript{13} It was not until 1966 that the admiralty and non-admiralty dockets merged into regular civil actions under the general provisions of the Federal Rules of Civil Procedure.\textsuperscript{14}

The procedural rules for assertion of admiralty jurisdiction are simple enough. A claim in admiralty is either a claim in which an admiralty ground constitutes the only basis for a suit, or a case in which admiralty jurisdiction is specially pleaded even though separate jurisdictional options exist.\textsuperscript{15} If the court finds no basis for admiralty jurisdiction, and no other ground of federal jurisdiction can be stated, the suit must be dismissed.\textsuperscript{16}

Many plaintiffs may find the common law and statutes surrounding admiralty more favorable than the laws of their state. One particular advantage is the three-year statute of limitations on tort actions involving wrongful

\begin{footnotesize}
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\item[12] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77. The current jurisdictional statute carries over substantially similar language, stating that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1988).
\item[13] The "savings to suitors" clause allows a plaintiff, otherwise under personal jurisdiction of a federal court, to elect to sue in a state court under an ordinary civil action. The state court would be required to apply the same substantive law as would apply if the suit had been filed in a federal court. Shannon v. City of Anchorage, Alaska, 478 P.2d 815, 818 (Alaska 1970).
\item[14] Id. at 2 (referring to the 1966 Amendment to the Federal Rules of Civil Procedure). "Despite this 'unification', the admiralty power remains a separate and independent ground of jurisdiction, both constitutional and statutory."\textsuperscript{15} \textit{Id.}
\item[15] Id. at 20. The pleading rules are set forth in Fed. R. Civ. P. 9(h). In addition, the Federal Rule provides that "[i]f the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not." Fed. R. Civ. P. 9(h). Clearly, the plaintiff in a suit involving an aviation tort over navigable waters benefits by specially pleading admiralty jurisdiction, thus ensuring that any admiralty claims may later be asserted.
\item[16] \textsuperscript{16} \textit{Gilmore & Black, supra} note 11, at 34.
\end{itemize}
\end{footnotesize}
death. Plaintiffs within admiralty jurisdiction can also avoid jury trials. Other various considerations include liberal venue provisions, comparative negligence concepts, and limitations of liability. Furthermore, the doctrine of res ipsa loquitur may be available to aviation tort suits within admiralty. Defendants may also benefit from moving a suit into admiralty, since a defendant in an admiralty claim can insist that a plaintiff pursue a judgment against a third-party defendant. Thus, incentives do exist which may compel parties in aviation tort cases to assert admiralty jurisdiction, even if there are alternative grounds for a federal court to hear a case.

B. OLD JURISDICTIONAL STANDARDS AND THE DOCTRINE OF EXECUTIVE JET

Prior to 1972, the test of admiralty jurisdiction more or less depended upon the locality of the act under dispute. 17

17 46 U.S.C. app. § 763(a) (1988) provides that "a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued." Claims under DOHSA brought against the United States, however, are subject to a shorter two-year period under the Suits in Admiralty Act (SAA). 46 U.S.C. app. § 745 (1988). See discussion infra notes 77-78 and accompanying text.

18 The Seventh Amendment guarantees parties the right to a jury trial in "[s]uits at common law." U.S. Const. amend. VII. However, admiralty has traditionally been excluded from the definition of "common law" under the meaning of the Seventh Amendment. See Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1848); Green v. Ross, 481 F.2d 102, 103 (5th Cir.), cert. denied, 414 U.S. 1068 (1973). This view takes procedural substance within Rule 38(e) of the Federal Rules of Civil Procedure, which states that the general Rule 38(a) jury trial guarantee "shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim ... ." Fed. R. Civ. P. 38(e). See Billy Coe Dyer, Note, The Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction When a Proceeding Turns Hybrid, 63 Tex. L. Rev. 533 (1986).


20 Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431 (9th Cir. 1983).


22 Steven F. Friedell et al., 2 Benedict on Admiralty § 2 at 1-6 n.7 (7th ed. 1986).
Hence, admiralty jurisdiction would be invoked simply if the litigated tort occurred in the high seas or navigable waters.\textsuperscript{23} This "strict locality rule" quickly found its critics, who argued that cases were being admitted into federal courts based upon solely fortuitous circumstances.\textsuperscript{24}

The critics of the strict locality rule finally won over the Supreme Court, which explicitly rejected the rule in \textit{Executive Jet v. City of Cleveland}.\textsuperscript{25} This 1972 case involved an aircraft which had ingested seagulls into its engines during a takeoff, causing it to crash into Lake Erie.\textsuperscript{26} Although no injuries were sustained, the plane sank and became a total loss. The owners of the aircraft invoked admiralty jurisdiction, claiming that the city acted negligently in failing to keep the airport free of birds.\textsuperscript{27} The District Court for the Northern District of Ohio dismissed the complaint for lack

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\textsuperscript{23} Gilmore summarizes the definition of navigable waters, as required by admiralty, as:
- all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce,
- whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state.

\textit{See} GILMORE \& BLACK, supra note 11, at 31-32. The definition of "high seas" has relevance because under DOHSA, discussed at part IV.A., \textit{infra}, the death by wrongful act must occur "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 . . . ." 46 U.S.C. app. \S 761 (1988). In addition, it is important to note that the Ninth Circuit has held that all waters \textit{within} the territorial waters of a foreign country be deemed as the high seas, even though territorial waters of the United States are not so defined. Roberts v. United States, 498 F.2d 520, 524 (9th Cir. 1974).

\textsuperscript{24} For a discussion of these critics, see Wiggins, \textit{infra} note 9, at 179-88.

\textsuperscript{25} 409 U.S. 249 (1972).

\textsuperscript{26} It is well-established that the Great Lakes and the Mississippi and its tributaries qualify as the "navigable waters" required for admiralty jurisdiction. GILMORE \& BLACK, supra note 11, at 30 (citing Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867)).

\textsuperscript{27} \textit{Executive Jet}, 409 U.S. at 249. Asserting admiralty jurisdiction would have enabled the aircraft owners to avoid a bar imposed by the Ohio statute of limitations. \textit{See} Gutoff, \textit{infra} note 9, at 316.
of subject matter jurisdiction, and the Sixth Circuit affirmed.\textsuperscript{28}

The Supreme Court subsequently upheld the lower courts' dismissal of the case, finding that no admiralty jurisdiction existed in this particular case. It openly criticized a "purely mechanical application" of the locality test, noting that such an exclusive test of admiralty jurisdiction creates special problems when aviation torts are concerned.\textsuperscript{29} Rather than focusing on where such a tort is committed, the Executive Jet Court declared that the history of admiralty law warranted a requirement that "the wrong bear a significant relationship to traditional maritime activity," and that the absence of such relationship would cause the action to be barred in admiralty.\textsuperscript{30} The Court also hinted that only by legislative action could such a claim survive a jurisdictional challenge.\textsuperscript{31}

With the announcement of this new standard, prospective plaintiffs of aviation tort cases could no longer be certain of an admiralty option even if the tort occurred in navigable waters. The main problem in interpreting the decision involved determining exactly what would constitute a "traditional maritime activity."\textsuperscript{32} The Court did give an example of an event that did not meet the requisite maritime relationship — the instance in which a land-based plane

\textsuperscript{28} Executive Jet, 409 U.S. at 251-52.

\textsuperscript{29} Id. at 261. In using the instant case as an example, the Court explained:
The case before us provides a good example of these difficulties. The petitioners contend that since their aircraft crashed into the navigable waters of Lake Erie and was totally destroyed when it sank in those waters, the locality of the tort, or the place where the alleged negligence took effect, was there. The fact that the major damage to their plane would not have occurred if it had not landed in the lake indicated, they say, that the substance and consummation of the wrong took place in navigable waters. The respondents, on the other hand, argue that the alleged negligence took effect when the plane collided with the birds — over land.

\textsuperscript{30} Id. at 267. The Court avoided deciding whether either party had the more persuasive argument; its decision ultimately focused on the nature of the wrong rather than its locality. \textit{Id.} at 268.

\textsuperscript{31} \textit{Id.} (emphasis added).

\textsuperscript{32} Wiggins, \textit{supra} note 9, at 192.
crashed during a flight from one point in the continental United States to another.\textsuperscript{39} In addition, the Court mentioned factors which it deemed relevant to the analysis, including the similarities between a downed plane and a sinking ship, territorial versus international waters, and the locality of the committed tort.\textsuperscript{34} The relative weight of such factors were left for the lower court's discretion.

C. Initial Applications of the \textit{Executive Jet} Standard

As would be expected, commentators and courts struggled to apply and analyze the \textit{Executive Jet} standard.\textsuperscript{35} In the ten years following the Supreme Court opinion, different courts chose different approaches in defining the "significant maritime relationship" required to find admiralty jurisdiction over aviation torts. Generally, the approaches can be classified into three categories: a functional test, a "locality plus" standard, and an activity-based test.\textsuperscript{36}

1. The Functional Approach

A functional test focuses on the function of the aircraft in question, so that a maritime relationship is found if the aircraft is acting in a traditional maritime capacity.\textsuperscript{37} The cause of a specific tort will therefore not be considered if the functional test is used.

A 1973 Florida district court, in \textit{Teachey v. United States},\textsuperscript{38} first chose to construe \textit{Executive Jet}'s test as functional rather

\textsuperscript{33} \textit{Executive Jet}, 409 U.S. at 271.

\textsuperscript{34} Id. at 264-66.


\textsuperscript{36} Roberts v. United States, 498 F.2d 520 (9th Cir. 1974), cert. denied, 419 U.S. 1070 (1975), discussed at part II.C.2., \textit{infra}.

\textsuperscript{37} See Wiggins, \textit{supra} note 9, at 194, 206. An example of a traditional maritime capacity could be the maritime nature of a "search and rescue" operation. \textit{Id.} at 194.

\textsuperscript{38} 363 F. Supp. 1197 (M.D. Fla. 1973).
than causal, noting that the cause of aviation torts will "almost invariably [be] attributable to a cause unrelated to the sea . . . ."39 The facts in this case involved a Coast Guard helicopter that crashed on land following a rescue of shrimp fisherman from a sinking boat in the Gulf of Mexico. The plaintiff emphasized that the helicopter had been acting in a capacity traditionally reserved for sea vessels. The court agreed with the plaintiff's reasoning but not his conclusion. In finding that no maritime relationship existed, the court focused on the fact that the crash occurred after a refueling stop and subsequent to the Gulf rescue operation. Hence, any maritime connection ceased upon the refueling stop.40 A court following the Teachey rationale therefore looks to see if the accident occurred while performing an act which is functionally equivalent to the job of a sea vessel.

This functional application found further supporters in other jurisdictions, particularly the Fifth Circuit.41 For example, in Ledoux v. Petroleum Helicopters42 the appellate court, in a per curiam decision, asserted that a helicopter being "used in place of a vessel to ferry personnel to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity" needed to invoke admiralty laws.43 Unstated in the opinion, but implied by its result, was the corollary theory that helicopters have more of a maritime relationship than planes, even

39 Id. at 1199.
40 Id.
41 See Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974) (holding that "the functions and roles of the parties" are determinative factors in deciding whether admiralty rules would apply in a boating accident); Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973), aff'd in part, 545 F.2d 422 (5th Cir. 1977), rev'd on other grounds, 436 U.S. 618 (1978) (holding that a helicopter fulfilled the maritime relationship requirement because it was ferrying passengers to an offshore oil rig, a duty ordinarily performed by a crewboat). See also Miller v. Cousins Properties, 378 F. Supp. 711 (D.C. Vt. 1974) (holding that a passenger plane crash into navigable waters did not fall within admiralty jurisdiction because the function of the plane was to carry passengers between points within the continental United States).
42 609 F.2d 824 (5th Cir. 1980) (per curiam).
43 Id. at 824.
though both may serve similar functions. This theory seems reasonable if later cases involving similar oil-rig/helicopter scenarios are examined. Thus, while a helicopter crashing into the Gulf of Mexico may find remedies in admiralty, a single-engine pleasure plane may not.

2. The "Locality Plus" Standard

The Ninth Circuit elected to apply a new two-prong analysis for admiralty jurisdiction in the 1974 case of Roberts v. United States. The Roberts court examined an attempted admiralty complaint over a cargo plane which crashed into navigable waters 2000 feet from the runway at a United States Air Base in Okinawa. While the Ninth Circuit could conceivably have applied a simple functional test, the Roberts court constructed a test requiring navigable waters locality plus a maritime nexus requirement. Here, "geographic realities," combined with the "transoceanic transportation of cargo" warranted a finding of a valid maritime action.

The "plus" requirement altered the functional test by expanding maritime nexus criteria to include, in addition to functional characteristics, "the types of vehicles and instrumentalities involved; the causation and the type of injury; and the traditional concepts of the role of admiralty law." Under "locality-plus," these characteristics must have a mar-

44 Id.
45 Hayden v. Krusling, 521 F. Supp. 468 (N.D. Fla. 1982) (finding that the disappearance of a land-based plane flying from New Orleans to Pensacola bore no significant relationship to a maritime activity, even though its last positions were plotted more than fifty miles south of the northern Gulf of Mexico shoreline). Cf Mancuso v. Kimex, 484 F. Supp. 453 (S.D. Fla. 1980), (involving a claim arising out of the crash of a Douglas DC6 cargo plane into the sea 300 feet short of a runway in Kingston, Jamaica). The Mancuso plaintiff's DOHSA cause of action survived a jurisdictional attack when the court deemed admiralty as a proper forum, finding that the "requisite maritime status" existed where "the plane was being used in lieu of a vessel to carry cargo from the United States to Jamaica." Id. Possibly, the Mancuso court viewed cargo planes to foreign countries as being more "maritime" than passenger planes flying over the Gulf. At any rate, it is interesting that the Hayden court later chose to ignore Mancuso in denying a passenger plane admiralty jurisdiction.
46 498 F.2d 520 (9th Cir. 1974), cert. denied, 419 U.S. 1070 (1975).
47 Id. at 523; see Wiggins, supra note 9.
48 Roberts, 498 F.2d at 524.
itime quality in addition to the event occurring in a maritime locality.

This definitional expansion, rather than creating a reliable standard, opened the door for a free-form test largely dependent upon factual circumstances. For example, in T.J. Falgout v. United States50 the Ninth Circuit held that a suit involving an accidental discharge of a Navy Sidewinder missile from a Navy airplane was cognizable in admiralty.51 Its rationale in that case rested upon the premise that Navy operations were maritime operations per se, regardless of whether aircraft or vessels were involved.52 Interestingly, the Falgout court had chosen to focus on the Navy plane’s relationship to a maritime activity, rather than the plaintiff’s ship, which was struck by the Sidewinder missile. Nothing in the decision indicates why the plaintiff’s ship alone could not have satisfied the maritime relationship requirement.

The “locality plus” standard has also been applied to find admiralty jurisdiction over incidents involving seaplanes. In the Virgin Islands, the problems faced by seaplanes in take-offs and landings have been held sufficiently maritime in nature to warrant jurisdiction under admiralty law.53

3. The Activity-Based Test

Various district courts departed from the functional and “locality plus” tests, concentrating instead on the “activity” part of the “traditional maritime activity” referred to in Executive Jet.54 This more restrictive view seems to require an obvious maritime connection, rather than a functional equivalent. A Pennsylvania district court, in American Home
Assurance Co. v. United States,\textsuperscript{55} completely ignored the functional use of a plane ferrying passengers from Atlantic City, New Jersey, to Block Island, New York. This court suggested that the \textit{Executive Jet} court appeared to question whether aviation accidents, under any circumstances, were appropriate subjects of admiralty suits per se.\textsuperscript{56} Hence, although Block Island may only be accessed by air or sea, the Pennsylvania court appeared to require an element of substance over function in denying the plaintiffs an admiralty claim.

Exactly what would substantiate the Pennsylvania court’s definition of a “traditional maritime activity” is subject to debate. The court clearly did not believe that aviation suits belong in admiralty law. In a different jurisdiction, the results could have been quite different. It could be fairly easy to justify admiralty in \textit{American Home} via the functional test by stating that transportation to Block Island traditionally was accomplished by ferry.\textsuperscript{57}

In New York, a district court later applied a cursory “activity-based” test in a case in which a helicopter transporting passengers to an oil rig crashed thirty miles from the Norwegian coastline.\textsuperscript{58} Paying no attention to the function of the craft, nor to the foreign locality, the court merely stated that “the accident that gave rise to this suit [was] probably related closely enough to extensive offshore operations to fall within the Court’s admiralty jurisdiction.”\textsuperscript{59} Clearly, \textit{Executive Jet} failed to define an appreciable jurisdictional standard for aviation torts.

The discussion thus far has covered the initial cases interpreting the \textit{Executive Jet} standards and the three discernable approaches that have been applied. In the early to mid-1980s, however, the courts continued to wrestle with the

\textsuperscript{56} Id. at 658.
\textsuperscript{57} See, e.g., Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1126 (5th Cir. 1972) (noting in dicta that a ferry sinking into the Mississippi River would satisfy requirements for admiralty jurisdiction).
\textsuperscript{59} Id. at 496.
problem, and the only constant has been their inconsistency. The next sections discuss more recent case law, issues involving the growing number of non-wrongful death suits, and potential legislative reform.

III. OIL AND WATER, AVIATION AND ADMIRALTY — THE CONTINUING FAILURE TO MIX

During the 1980s, judges still seemed willing to allow aviation suits within admiralty jurisdiction, despite suggestions that courts limit such cases to situations where proposed statutory rules could provide for admiralty. These statutory proposals have continually failed to survive committee challenges and courts, reluctant to dismiss perfectly valid claims upon jurisdictional grounds, have applied flexible standards to spare claims from a quick judicial death. The following sections highlight the more recent decisions affecting the way courts interpret admiralty law with respect to aviation torts.

A. Smith v. Pan Air and the Resulting Mess

The Fifth Circuit had the opportunity to fully review the first ten years following Executive Jet in Smith v. Pan Air Corp., a decision examining suits arising from two separate aircraft crashes. In one claim, a widow sought damages in admiralty from the employer of her deceased husband. Her husband, a pilot who regularly flew passengers engaged in mineral exploration to and from Louisiana shores, was killed when his seaplane crashed into Louisiana soil as he returned from a river-based minerals operation. The second claim concerned a helicopter used to transport oil rig workers to and from platforms located in the Gulf of Mexico. As the pilot took off from a rig platform, the helicopter collided with a nearby crane ball and crashed into the Gulf, killing the pilot. The widows of both pilots

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60 See generally Brackin, supra note 4; Wiggins, supra note 9.
61 See discussion at part V, infra.
62 684 F.2d 1102 (1982).
brought appeals after the district courts dismissed both suits for lack of admiralty jurisdiction. The Fifth Circuit consolidated the cases.

With respect to the first suit involving the seaplane crash, the Fifth Circuit upheld the district court's dismissal of that claim.63 The decisive factor appeared to be the fact that the seaplane crashed into an inland Louisiana marsh rather than navigable waters.64 Disregarding both the functional purpose of the seaplane and the relationship of the wrong to a traditional maritime activity, the Smith court opined that “maritime locality is still an indispensable element of maritime jurisdiction” and ended its analysis on the seaplane accident at that point.65 Hence, Smith promulgates locality as an indispensable part of admiralty jurisdiction.

The second set of facts in Smith, which involved both wrongful death and property damage claims, survived the admiralty jurisdiction test under the Fifth Circuit's reasoning.66 First, the fact that the wrongful death “occurred as a result of an aircraft crash into the high seas [was] alone enough to confer jurisdiction under the DOHSA.”67 Furthermore, in examining the property damage claim, the court chose explicitly to extend admiralty jurisdiction to non-death claims originating on the high seas as long as the flight had an “essential maritime nexus.”68 It reasoned that, while such claims must always satisfy the “locality-plus” test, a separate justification existed since “judicial economy” occurs by litigating related claims in the same court.69 Thus, Smith v. Pan Air firmly established maritime locality as an absolute prerequisite to the survival of an aviation tort claim in an admiralty suit, at least within its own jurisdiction.

63 Id. at 1108.
64 Id.
65 Id.
66 Id. at 1108-12.
67 Smith, 684 F.2d at 1111.
68 Id. at 1112.
69 Id.
Nevertheless, this bright-line test remains confusing since statutory grants confer admiralty jurisdiction over injuries occurring on land. For example, the Jones Act extends admiralty jurisdiction to injuries suffered by crew members in the course and scope of their employment, even if suffered on land. The emphasis on "maritime relationship" conceivably led plaintiffs, prior to the Smith decision, to believe that locality's impact on the jurisdictional question had lessened in the years following Executive Jet. When considering that admiralty jurisdiction had earlier been granted in cases involving seaplanes, and that admiralty had been denied in the Gulf of Mexico plane crash cases, the confusion becomes quite clear. Aviation tort plaintiffs, confronted with borderline fact situations, must roll the judicial dice if they wish to remain in admiralty law.

B. THREE UNLUCKY ROLLS OF THE ADMIRALTY DICE

The jurisdictional dilemma was used to the federal government's advantage in Miller v. United States. In Miller, two men flew from the Bahamas to Florida in a private plane. Their plane crashed into international waters forty miles from West Palm Beach. Relatives of the deceased filed suit against the United States, seeking to hold the air traffic controllers responsible for the deaths. They based their claims upon the Federal Tort Claims Act (FTCA).

The United States sought to have the suit dismissed on grounds that the claims should have been filed under the

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70 See id. at 1107 n.12 (citing O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943)); see also Vincent v. Harvey Well Serv., 441 F.2d 146 (5th Cir. 1971). The Jones Act, passed in 1920, applies to seamen injured in the course of their performance and allows them to recover damages against their employers. 46 U.S.C. app. § 688 (1988). The first widow in Smith attempted to bring claims under both the Jones Act and general admiralty law. Her Jones Act argument failed because the court believed that the seaplane pilot was not a "seaman" within the meaning of the Act. Smith, 684 F.2d at 1112.
71 See supra note 54.
72 See supra note 53 and accompanying text.
73 See supra note 45 and accompanying text.
74 725 F.2d 1311 (11th Cir.), (involving negligent air traffic controllers), cert. denied, 469 U.S. 821 (1984).
Suits in Admiralty Act (SAA) rather than the FTCA. The suit would then have to be dismissed because of the SAA's shorter statute of limitations. The Eleventh Circuit questioned whether the "land based negligence" of the air traffic controllers, which resulted in an airplane crash into the high seas, was within admiralty jurisdiction.

Citing the Roberts case as support, the Eleventh Circuit disregarded the locality of the negligence and held the locality of the actual accident was determinative. In addition, the function of the plane significantly influenced the Miller holding "because the trip between the Bahamas and the United States has traditionally been accomplished by ship, and would, of necessity, have to be accomplished by ship but for the introduction of the airplane into this forum." The relatives of the deceased in Miller consequently lost their cause of action against the United States.

The plaintiffs in City of New York v. Waterfront Airways also lost the battle in an attempted admiralty suit against the private owners of a New Jersey commuter floatplane, Waterfront Airways. In this case the plaintiffs, rather than the defendants, pled jurisdiction within admiralty. The floatplane, during a flight between Wall Street and New Jersey, collided with a traffic patrol helicopter and crashed into New York Harbor. The pilot and one passenger died in the accident, but two other passengers survived. Since both passengers and Waterfront Airways were New Jersey residents, no diversity existed and federal jurisdiction had to be predicated upon admiralty.

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77 The Suits in Admiralty Act applies to maritime suits against the United States. See supra note 17.
78 Miller, 725 F.2d at 1312.
79 Id. at 1315 (citing Roberts v. United States, 498 F.2d 520 (9th Cir. 1974), cert. denied, 419 U.S. 1070 (1975)). For a discussion of Roberts see supra notes 46-48 and accompanying text.
80 Miller, 725 F.2d at 1312.
81 Id.
82 620 F. Supp. 411 (D.C.N.Y. 1985). Waterfront's factual setting provided the basis for the Introduction to this comment.
83 Id. at 412.
The New York district court did not appear concerned with the locality portion of its two-pronged “locality plus” test; the court actually proceeded under the assumption that a maritime locale existed, though the court acknowledged even that assumption was subject to debate. Rather, the “traditional maritime activity” standard killed the cause of action: “The mere fact that a plane is a float-plane and thus equipped to make takeoffs and landings in water is insufficient, in and of itself, to be grounds for finding the existence of admiralty jurisdiction.”

The Waterfront court further rejected the plaintiff’s attempts to cite prior cases where seaplane accidents properly fell within admiralty. It distinguished *Hark v. Antilles Airboats* from the Waterfront scenario by explaining that the former case based its decision upon the navigational similarities faced by pilots of floatplanes during takeoffs and landings, and by pilots of other water vessels. Under the Waterfront court’s reasoning, *Antilles* could not apply because the crash in *Waterfront* occurred after takeoff and prior to its landing. In addition, the lack of the international waters locale, present in *Antilles*, also swayed the New York court’s decision (despite its assumption, for the sake of legal analysis, that the required locality was present).

Finally, the plaintiff’s appeal to a functional test fell upon deaf ears. The plaintiff cited the case of *Higginbotham v. Mobil Oil Corp.*, which found admiralty jurisdiction proper in an accident involving a floatplane transporting oil workers to an oil rig. The Waterfront court again distinguished the cited case, noting that the decisive factor in *Higginbotham* was that only ships or planes could access the oil rigs.

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84 Id. at 414.
85 Id.
88 Id.
89 Id.
Thus, *Higginbotham* could not be applied to the *Waterfront* case because water and air travel were not the "exclusive means of access" between New York and New Jersey.  

All of the *Waterfront* reasonings can be criticized. First, in its *Hark* application, the court asserts that floatplanes may be admiralty subjects when taking off or landing, but not when actually in the air. This construction leaves jurisdiction open to entirely fortuitous circumstances. Second, its complaint of the lack of an international waters locale disregards other possible exercises of admiralty jurisdiction over accidents occurring within domestic navigable waters. Nor does the argument requiring water or air as the exclusive means of transport provide a better standard for predicting admiralty. The lack of a reliable gauge undoubtedly confuses litigants in their choice of forums.

Another example of parties penalized by the very fact-specific approach in the court's jurisdictional analysis occurs in *Brons v. Beech Aircraft Corp.*, where a district court denied admiralty to a plane that crashed more than four nautical miles beyond the Florida shoreline. The persons on the plane, a flight instructor and his student, were both killed, and their relatives filed a suit under the Florida Wrongful Death Act. The defendant sought summary judgment, claiming that DOHSA provided the plaintiff's exclusive remedy. Finding that admiralty jurisdiction did not

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92 *Id.*  
93 *Id.* at 414. "In the instant case, the collision occurred after the Floatplane was airborne, and prior to its descent for landing, thus the navigational concerns associated with takeoffs and landings in water are simply not present." *Id.*  
94 The definition of navigable waters within the context of an admiralty action includes domestic navigable waters. See supra note 23.  
95 See, e.g., *American Home Assurance Co. v. United States*, 389 F. Supp. 657 (M.D. Pa. 1975) (holding that a charter to a New York island, accessible only by sea or air, did not bear sufficient relationship to maritime activities to invoke admiralty jurisdiction), see supra notes 55-57 for the initial discussion of this case.  
97 *Id.* at 231 n.1. The crash thus occurred well beyond the one marine league requirement needed to satisfy the statutory DOHSA requirement. *Id.* A marine league equals one-twentieth part of a degree of latitude, or three geographical or nautical miles. BLACK'S LAW DICTIONARY 967 (6th ed. 1990).  
98 FLA. STAT. ANN. §§ 768.16-.27 (West 1986).
apply in this case, the *Brons* court denied the defendant's motion and allowed the plaintiff to maintain an action under the Florida statute.\(^9\)

In *Brons* the court addressed one area of confusion — whether *Executive Jet* requirements must still be satisfied in a DOHSA action.\(^10\) *Brons* ruled that even DOHSA required a relationship to a traditional maritime activity.\(^1\) Apparenty, the *Brons* court reached this conclusion because the *Miller* court applied an *Executive Jet* test to find admiralty jurisdiction even though the accident occurred forty miles southeast of Florida.\(^2\)

The court then found that the *Brons* accident had no relationship to a traditional maritime activity, since its purpose was merely flight instruction, and the destinations were entirely within Florida.\(^3\) "The location of the accident was totally fortuitous."\(^4\) By requiring the maritime nexus, the *Brons* court removed the plaintiff's claim from the exclusive provisions of DOHSA, denying the defendant's motion for summary judgment.\(^5\)

Finally, *Duplantis v. Petroleum Helicopters, Inc.\(^6\)* illustrates the confusion surrounding aviation in an admiralty context more than twenty years after *Executive Jet*. The *Duplantis* plaintiff sought a Motion to Remand their case, which was

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\(^10\) Id. at 232. The text of the statute is provided *supra* note 6. Prior to *Brons*, cases were unclear as to whether a maritime nexus would still be required in a DOHSA action. Indeed, one commentator believed that the *Executive Jet* standards and DOHSA were mutually exclusive, so that the nexus requirements would not apply to accidents beyond territorial waters. Moris Davidovitz, *Aviation Deaths on the Seas: The Flight into Maritime Law*, 10 Hastings Int'l & Comp. L. Rev. 57, 66-67 (1986) ("[T]he *Executive Jet* test should apply solely to aviation accidents that occur on a state's territorial waters within the marine league boundary."). Mr. Davidovitz cited Offshore Logistics v. Tallentire, 477 U.S. 207 (1986), as support (discussed *infra* at notes 108-116). Neither the Supreme Court nor Mr. Davidovitz attempted to reconcile this interpretation with the district court decision.

\(^1\) 627 F. Supp. at 252 (*citing* Miller v. United States, 725 F.2d 1311 (11th Cir.), cert. denied, 469 U.S. 821 (1984)).

\(^2\) Id. at 232-33.

\(^3\) Id.

\(^4\) Id.

\(^5\) Id.

previously removed by the defendant to a federal court. The litigation arose out of a helicopter crash in a marsh within the territorial limits of Louisiana. Seeking remand of the case back to a state court, the plaintiffs argued that a federal court had no jurisdiction to hear the case. The Louisiana district court agreed, ignoring any functional use of the helicopter, and stated that because the marshy areas involved were not "navigable in fact," the case did not satisfy the requirements for admiralty jurisdiction.\textsuperscript{107}

By 1983, the status of aviation torts within the realm of admiralty appeared posed for a crash landing. By requiring the satisfaction of the \textit{Executive Jet} standards in aircraft tort cases, even when the statutory provisions of DOHSA are otherwise satisfied, the courts ensured continuing confusion more than two decades after the supposedly landmark decision. The difficulty of asserting admiralty in aviation cases was clear, yet the courts still refused to close the door entirely. Confusing jurisdictional standards, however, would not be the sole problem when considering whether aviation torts belong in admiralty. The next section highlights recent issues that complicate the litigant's choice of forum.

\section*{IV. HARDLY A UNIFORM CASELAW STANDARD: ADMIRALTY'S INEFFECTIVENESS IN HANDLING AVIATION TORTS}

While the \textit{Executive Jet} test remains muddled twenty years after its inception, most recent cases involving aviation torts have examined issues arising from admiralty's incompatibility with aviation even if the jurisdictional requirements are met. The next four cases have all been allowed in federal courts on the basis of a sufficient maritime nexus, but for various reasons the litigants have been penalized as a result of admiralty's failure to deal with specialized problems in aviation.

\textsuperscript{107} \textit{Id.} at *3.
A. DOHSA AND STATE LAW PREEMPTION

The United States Supreme Court addressed the ubiquitous helicopter/oil-rig crash scenario in *Offshore Logistics v. Tallentire.*\(^{108}\) The facts here concerned a helicopter that crashed thirty-five miles south of the Louisiana coastline, killing respondent Tallentire's husband and one other passenger. The Supreme Court found jurisdiction over the case via DOHSA since the deaths occurred more than one marine league from shore.\(^ {109}\)

For the most part, jurisdiction based upon DOHSA will be desirable from the plaintiff's perspective because the statute: (1) establishes a three-year statute of limitations, (2) allows continuance of suits filed by victims who die prior to the end of the suit, and (3) prevents contributory negligence from barring recovery.\(^ {110}\) The statute, however, limits recovery to "fair and just compensation for... pecuniary loss."\(^ {111}\) In *Offshore Logistics* the respondent/plaintiff sought, in addition to the DOHSA pecuniary damages, non-pecuniary damages for loss of consortium, service, and society, as permitted under the Louisiana statutes then in effect.\(^ {112}\) The Eastern District of Louisiana ruled that

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\(^{108}\) 477 U.S. 207 (1986).

\(^{109}\) Id. at 218. A textual argument can be advanced concluding that the *Offshore Logistics* Court chose not to follow the *Brons* argument (see supra notes 96-105 and accompanying text), which required satisfaction of the Executive Jet test in addition to the DOHSA locality requirement. The Court states: "Even without [DOHSA], admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity." *Id.* at 218-19. This seemingly indicates that under the Supreme Court's interpretation, only satisfaction of DOHSA will be needed for admiralty to be invoked. See also supra note 101.


\(^{112}\) La. Civ. Code Ann. art. 2315(B) (West Supp. 1986). The Louisiana statutes, if applicable, would have been applied in federal court via the Outer Continental Shelf Lands Act (OCLSA). OCLSA generally provides for federal jurisdiction over accidents on "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures" upon the Shelf. 43 U.S.C. § 1333(a)(2)(A) (1988). While federal jurisdiction controls, the adjacent state law is adopted to the extent that it is not inconsistent with federal law. *Offshore Logistics,* 477 U.S. at 210. Hence, the *Offshore Logistics* respondent had to contend with three possible jurisdictional doorways. The Supreme Court eventually ruled that the since the accident did not
DOHSA provided an exclusive remedy for death on the high seas, dismissing the respondent's claim for damages under the Louisiana statute. The Fifth Circuit reversed the lower court, and the Supreme Court granted certiorari.

In a decision relevant to any potential plaintiffs seeking federal jurisdiction under DOHSA, the Supreme Court reversed the Fifth Circuit holding and ruled that DOHSA, if applicable, would effectively preempt state wrongful death statutes. While an extensive analysis of the Offshore Logistics reasoning in reaching this conclusion is beyond the scope of this comment, the Court essentially rationalized that "where Congress has spoken, or where general federal maritime law controlled, the States exercising concurrent jurisdiction over maritime matters could not apply conflicting state substantive law." While the Supreme Court's decision concededly "prevents disunity in the provision of forums to survivors of those killed on the high seas," the advantages of the preemption rules are reduced in cases involving borderline admiralty/aviation torts. The difficulty in predicting whether or not admiralty, and hence DOHSA, applies has been demonstrated in the prior sections. Consequently, a bad guess regarding the way a court views such a case creates a double-edged sword — it can trigger dismissal of a claim in federal court if not cognizable in admiralty, or can cut off state remedies if allowed as a maritime claim. This uncertainty undermines the litigant's ability to choose the most beneficial forum for his claim, or even predict whether a claim will be allowed at all. The confusion then begs the question of whether DOHSA, enacted in 1920, should be

occur on the platform, OCLSA did not apply and DOHSA provided the sole means of federal jurisdiction. Id. at 219-20.

113 Offshore Logistics, 477 U.S. at 219-20.


115 Id. at 288.

116 Offshore Logistics, 477 U.S. at 232.
an appropriate provision for modern aviation problems at all.\footnote{The question becomes more compelling as litigation extends beyond the air and into space. Davidovitz, supra note 100, at 95 ("[B]ecause a good argument can be made that the vestiges of admiralty jurisdiction no longer logically apply to aviation deaths even though they occur on the high seas, the application of these principles to deaths that occur in space becomes even more tenuous.").}

B. The Problem of Noninjury, Nondeath Claims

Yet another complexity confounding the admiralty-aviation dilemma arose in Comind, Companhia de Seguros v. Sikorsky Aircraft.\footnote{116 F.R.D. 397 (D. Conn. 1987).} This case demonstrated the risk that a court could bifurcate noninjury, nondeath claims in accordance to varying maritime relationships. In Sikorsky an insurer of a helicopter buyer sued the seller and manufacturer on theories of breach of warranty, negligence, and strict products liability. The buyer, a Brazilian corporation, had purchased a fleet of helicopters from Sikorsky. One of the helicopters crashed off the coast of Brazil, killing fourteen people on board. The insurer of the buyer sought to recover all costs of the lost vehicle. In moving for summary judgment, one of the defendant’s arguments included a jurisdictional challenge.\footnote{Id. at 416.} According to the defendant, admiralty jurisdiction did not recognize negligence and products liability claims.\footnote{Id.}

In response, the Comind court cited a recent Supreme Court case that determined when products liability suits should apply to admiralty law. The court identified three possible scenarios where liability could be imposed. The first situation involves a defective product that malfunctions and causes personal injury to the user or third party. A second case could arise if a defective product malfunctions and almost causes injury (the “near miss” scenario). The third case occurs if the defective product malfunctions, but
fails to threaten parties with physical injury (the "disappointed but unharmed" scenario).\textsuperscript{121}

The court then stated that negligence and products liability in admiralty could only be asserted in the first scenario.\textsuperscript{122} Since deaths did occur in the facts of \textit{Sikorsky}, the court allowed the insurer's claims to remain within admiralty's jurisdiction.\textsuperscript{123} The court also chose to avoid the defendant's alternative argument that the helicopter sales agreement's warranty disclaimer barred recovery in admiralty.\textsuperscript{124}

Economic losses within aviation suits were again an issue in \textit{Icelandic Coast Guard v. United Technologies Corp.},\textsuperscript{125} where the plaintiff alleged that a helicopter was unreasonably dangerous and defective. The helicopter had crashed into the Jokulsfirdir fjords of northwest Iceland, and all four crew members drowned. Evidence showed that the helicopter's emergency flotation gear failed to deploy, and the sliding door's track mechanism jammed, trapping the crew members in the vehicle. In the resulting lawsuit, the Connecticut district court invoked admiralty jurisdiction by the "locality plus" test.\textsuperscript{126}

The defendant contended that a products liability claim could not exist in admiralty where a commercial party claimed solely a commercial economic loss.\textsuperscript{127} Apparently, the \textit{United Technologies} court agreed with the defendant, because it dismissed the plaintiff's claims for replacement of the aircraft, recovery of the wreck, loss of use of the aircraft, and training of replacement flight crews.\textsuperscript{128} The court allowed claims related to the search for the helicopter's crew,

\textsuperscript{121} \textit{Id.} at 416 (citing \textit{East River Steamship Corp. v. Transamerica Delaval Inc.}, 476 U.S. 858, 865 (1986)).

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.} at 417.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} 722 F. Supp. 942 (D. Conn. 1989).

\textsuperscript{126} \textit{Id.} at 945-46. The Icelandic locality satisfied the first prong, and the adaption of the helicopter for marine rescue passed the second part. \textit{Id.}

\textsuperscript{127} \textit{Id.} at 947 (citing \textit{East River Steamship}, 476 U.S. 858 (1986)).

\textsuperscript{128} \textit{Id.} at 948. The court said "[t]he mere existence of separate claims for wrongful death does not make those claims for commercial economic loss cognizable in
however, since they were "inextricably tied" to the personal injuries incurred.\textsuperscript{129}

In addition, a recent Colorado case examined an attempted admiralty suit alleging damages for mental distress. \textit{Morgan v. United Air Lines}\textsuperscript{130} involved a commercial airline flight between Honolulu and New Zealand. Shortly after takeoff from Honolulu, a cargo door and part of the fuselage of the plane separated due to decompression at 23,000 feet above sea level. Five seats (fortunately vacant) in the business section fell out of the plane when the fuselage separated. The plaintiffs, passengers on the flight, alleged mental distress stemming from the experience.\textsuperscript{131}

The \textit{Morgan} court felt the instant case did not belong in admiralty since the "alleged wrong [did] not bear a significant relationship to traditional maritime activity."\textsuperscript{132} The rationale was that since no cause of action for the infliction of emotional distress existed under traditional maritime law, state law should govern.\textsuperscript{133} This conclusion, reached despite a transoceanic locale and destinations separated by sea, seemingly asserts a third prong to the traditional \textit{Executive Jet} test. Apparently under \textit{Morgan}, a claim otherwise cognizable in admiralty will fail unless the claim involves a tort previously recognized under "traditional maritime law."\textsuperscript{134}

More recently, the Fifth Circuit acknowledged the inconsistency in remedies allowed under admiralty law in \textit{Nichols v. Petroleum Helicopters, Inc.}\textsuperscript{135} \textit{Nichols} involved a longshoreman's suit for loss of consortium, allegedly caused by injuries sustained in a helicopter accident which occurred eighty miles off the Louisiana coast. Citing three U.S.

\begin{itemize}
  \item Id.
  \item 750 F. Supp. 1046 (D. Colo. 1990).
  \item Id. at 1048.
  \item Id. at 1054.
  \item Id.
  \item Id.
  \item 17 F.3d 119 (5th Cir. 1994).
\end{itemize}
Supreme Court decisions, the Fifth Circuit construed the opinions as allowing recovery for loss of consortium when the injuries occur to longshoremen in territorial waters, but disallowing such damages when the accident occurs outside territorial waters (due to the pecuniary loss restriction under DOHSA). Somewhat reluctantly, the Fifth Circuit followed the disparate treatment of longshoremen within and without territorial boundaries, "until such time as the Supreme Court resolves this inconsistency.

The segmentation of claims discussed in this section highlights the inefficiency of litigating aviation torts in admiralty. Even if the initial action should survive the jurisdictional challenge, success in the admiralty forum still depends on a multitude of independent factors, including the legal theories of the suit, whether or not personal injuries were involved, and whether the laws of admiralty had previously recognized the tort involved. Perhaps the only safe conclusion that can be drawn from this trend is that air and water simply do not mix. Since aviation tort cases increasingly find it difficult to maintain suits in admiralty, the better solution may be to provide an absolute cut-off from maritime law when any aviation nexus is involved.

V. THE STATUTORY SOLUTION

A statutory scheme vesting jurisdiction over aviation accidents within federal courts has, over the years, earned the support of a vocal minority of legislators. Perhaps the most ardent of supporters was former Senator Joseph D. Tydings of Maryland, who chaired the Subcommittee of Improvements for Judicial Machinery during the second session of

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137 Nichols, 17 F.3d at 123.

138 Id.

139 See supra notes 118-124 and accompanying text.

140 See supra notes 125-129 and accompanying text.

141 See supra notes 130-134 and accompanying text.
the 90th Congress in the late 1960s.\textsuperscript{142} According to Senator Tydings, the confusing array of conflicting state laws generates further confusion when a major aircraft disaster is involved. Senator Tydings reasoned:

Most often these suits are filed in the Federal courts on the basis of diversity of citizenship of the parties. . . . Because of the lack of adequate procedural devices and because these suits may involve the conflicting laws of a number of different States, such combined trials are currently very difficult, if not impossible. The result is a considerable waste of judicial time, an increase in the expense of litigation, and a considerable delay in the rendering of justice to persons who are frequently badly in need of assistance.\textsuperscript{143}

With these arguments in hand, Senator Tydings proposed a series of bills so broad in scope, so far-reaching in their potential to affect the aviation industry, that they were ultimately destined to fail. The next sections examine the Tydings proposals and also more recent general aviation bills, all of which affect the jurisdictional dilemma of aviation torts.

\section*{A. The Tydings Proposals}

In April 1968, Senator Tydings proposed Senate Bill 3305, which would have established exclusive federal jurisdiction over civil damage actions resulting from the operation of aircraft in interstate or foreign commerce.\textsuperscript{144} A second bill, Senate Bill 3306, accompanied the first bill and advanced a much broader spectrum of instances for the federal court’s exclusive control.\textsuperscript{145} Both bills, which dif-

\begin{footnotesize}
\textsuperscript{142} John T. McDermott, Federal Jud. Center Staff Paper, in \textit{Air Disaster Litigation: The Need for Legislative Reform} 3 (1977).

\textsuperscript{143} 114 CONG. REC. 9435 (1968) (statements of Sen. Tydings).

\textsuperscript{144} S. 3305, 90th Cong., 2d Sess., \textit{reprinted in} 114 CONG. REC. 9436 (1968).

\textsuperscript{145} S. 3306, 90th Cong., 2d Sess., \textit{reprinted in} 114 CONG. REC. 9436 (1968).

\textsuperscript{146} \S\ 1363(a) of the proposed Senate Bill provided that:

The district courts. . . . shall have original jurisdiction, exclusive of the courts of the States and of all other courts and exclusive of any admiralty or maritime jurisdiction, of any action for damages for injury or loss of property, or personal injury or death claimed to be caused by negligent, tortious or wrongful act of [sic] omission arising out of, or in the
ferred only in details, purported to "make the Federal courts efficient instruments for rapidly dispensing justice" in cases arising out of aircraft accidents.\textsuperscript{146}

Senate Bill 3306 allowed for exclusive federal jurisdiction over aviation actions for injury or death caused by negligence or other tortious conduct.\textsuperscript{147} In contrast, Senate Bill 3305 provided for such exclusive jurisdiction over civil damages arising solely out of "interstate or foreign commerce."\textsuperscript{148} Although the reach of the two bills appears different, both proposed statutes could have provided a quick solution to many of the problems raised by the cases cited earlier in this comment. This is further supported by the fact that both bills attempted to establish a uniform body of federal substantive law that would apply to aviation activities.\textsuperscript{149} Such a provision could greatly alleviate the uncertainty and unfairness that can arise if admiralty laws conflict with other federal substantive laws.

A good example of how the Tydings proposals could have affected the cases discussed can be seen by applying the proposals to \textit{Miller v. United States}.\textsuperscript{150} The issue in \textit{Miller} involved the government's assertion of admiralty jurisdiction

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\textit{Id.} (emphasis added). Chapter 175 of the proposed bill defined "aviation activity" as any flight, takeoff, or landing over all places on earth, "whether by land or sea, including foreign countries." 114 CONG. REC. 9437 (1968). The provisions here are broader than those of S. 3305, which imposes exclusive jurisdiction over only "civil damage actions arising out of the operation of aircraft in interstate or foreign commerce." 114 CONG. REC. 9435 (1968). Hence, under the Tydings proposals, locality would no longer have any relevance in cases involving aviation torts.

\textsuperscript{146} 114 CONG. REC. 9435 (1968) (statements of Sen. Tydings).
\textsuperscript{147} S. 3306, 90th Cong., 2d Sess. (1968).
\textsuperscript{148} S. 3305, 90th Cong., 2d Sess. (1968). Section 1407(a)(2) of S. 3305 defined "interstate commerce" as commerce between different states and excluded commerce between sites in the same state unless the aircraft traveled "through the airspace over any place outside thereof." 114 CONG. REC. 9436 (1968).
\textsuperscript{149} 114 CONG. REC. 9435 (1968) (statements of Sen. Tydings). Section 2742 of Senate Bill 3306 created a "uniform body of Federal law governing all civil legal relations ... arising out of, or in the course of, aviation activity or space activity. Said body of law is exclusive of the laws and rules of law of the several States ... and the admiralty or maritime law heretofore applicable." 114 CONG. REC. 9437 (1968).
\textsuperscript{150} 725 F.2d 1311, \textit{cert. denied}, 469 U.S. 821 (1984); \textit{see supra} notes 74-81 and accompanying text.
over a plane crash in international waters just outside of Florida. The government’s successful claim caused the Eleventh Circuit to apply a shorter statute of limitations under the Suits in Admiralty Act (SAA) rather than a longer one under the plaintiff’s original FTCA claim.\(^{151}\) Under the proposed Senate Bill 3305 or Senate Bill 3306, which would govern all such aircraft incidents, the plaintiff’s claim would never have faced such an unlikely procedural danger because a substantive Federal aviation law would automatically preempt the SAA statute of limitations.\(^{152}\)

With respect to \textit{City of New York v. Waterfront Airways, Inc.},\(^{153}\) either Senate Bill 3305 or Senate Bill 3306 would have allowed federal jurisdiction since the floatplane crashed during a trip between New Jersey and New York. Both Tydings proposals would not have addressed whether the floatplane bore a “maritime nexus” since the interstate travel of the plane would suffice for the bill to apply. The problems advanced in \textit{Waterfront} — disputes involving locality, maritime activity, and functional purposes — would consequently have been rendered moot. Thus, much judicial time and expense would have been saved, enabling the parties to focus on the real questions of fault and compensation in a highly-publicized aircraft disaster.

Finally, application of the Tydings proposals would have quickly solved the outcome of \textit{Brons v. Beech Aircraft Corp.}\(^{154}\) The dispute in \textit{Brons} centered on whether or not a Florida wrongful death statute would control over a DOHSA remedy in a case where the plaintiff’s decedent crashed in a plane several miles south of the Florida shoreline. Obviously, the Tydings proposals would have eliminated such a conflict via exclusive substantive aviation laws.\(^{155}\) The problems involv-

\(^{151}\) See supra note 76 and accompanying text.

\(^{152}\) See supra note 77.

\(^{153}\) 620 F. Supp. 411 (S.D.N.Y. 1985); see supra notes 82-89 and accompanying text.

\(^{154}\) 627 F. Supp. 230 (S.D. Fla. 1985); see supra notes 96-105 and accompanying text.

\(^{155}\) See supra note 77.
ing bifurcation of economic losses would similarly be solved.\textsuperscript{156}

Despite the potential of the Tydings bills, the 90th Congress failed to act upon either proposal.\textsuperscript{157} Senator Tydings nevertheless introduced a third version of his proposals in September of 1968, modified by suggestions from the Senate Subcommittee on Improvements in Judicial Machinery.\textsuperscript{158} The reluctance of legislators to agree to a judicial change as broad as those contemplated by Senate Bill 3306 was reflected by the narrower jurisdictional scope provided by Senator Tyding's third version. Senate Bill 4089 "limit[ed] the availability of exclusive Federal jurisdiction to those aircraft crashes which ordinarily involve substantial numbers of people and multiple courts."\textsuperscript{159} Hence, the specific provisions of the revised bill vested exclusive federal jurisdiction over actions resulting from operation of common carriers, planes with seating capacities over ten passengers, accidents injuring more than five passengers, and all space activity.\textsuperscript{160} Another relevant modification provided that a uniform law of aviation would be established, but would be effective only to the extent that it did not conflict with other federal law.\textsuperscript{161} In addition, Tydings inserted a new passage explicitly reserving to the states the right of jurisdiction over criminal cases and those involving economic regulation of commerce that is "wholly intrastate."\textsuperscript{162} Despite the modifications, the 90th Congress closed without passing any of Tyding's bills.\textsuperscript{163} Legislation on aviation jurisdiction following the Tydings proposals were few, and

\textsuperscript{156} See supra notes 118-120 and accompanying text.
\textsuperscript{157} McDermott, supra note 142, at 14.
\textsuperscript{159} 114 Cong. Rec. 28616 (1968) (statement of Sen. Tydings).
\textsuperscript{160} S. 4089, 90th Cong., 2d Sess. § 1363(a) (1968).
\textsuperscript{161} Id. § 2751(a).
\textsuperscript{162} Id. § 2751(b).
\textsuperscript{163} Senator Tydings introduced a fourth version of his bills in 1969. S. 961, 91st Cong., 1st Sess. (1969). This bill, substantially similar to S. 4089, failed to pass as well.
those proposed called for only concurrent, rather than exclusive, federal jurisdiction over aviation torts. 164

B. THE FEDERAL JUDICIAL CENTER STUDY

In 1977 the Federal Judicial Center (FJC) published, at the request of a Judicial Conference Subcommittee on Federal Jurisdiction, a study which ultimately recommended both exclusive Federal jurisdiction over major air disasters and a uniform body of substantive federal aviation law. 165 Among the study’s contributors was the late Judge Pierson M. Hall, then serving the U.S. Central District of California. Senator Tydings, in his statements before the legislature in support of his 1960s proposals, credited Judge Hall with the general concepts behind the Tydings bills. 166

Although the study mainly addressed the problem of multiparty, multidistrict litigation 167 — a problem outside

164 A seemingly half-hearted attempt to reintroduce the jurisdictional aspect of the Tydings proposals materialized in 1973 with S. 1876, 93d Cong., 1st Sess. (May 23, 1973), which provided a statutory basis for including aircraft accidents within admiralty jurisdiction. Section 1316 of the bill would modify the still-effective 28 U.S.C. § 1333, cited supra note 12, to include for the purposes of admiralty jurisdiction,

any claim arising out of an aircraft accident occurring on or over the high seas or other navigable waters beyond a marine league from the shore of any State or the territories . . . but such jurisdiction shall not include . . . any claim solely because it arose on or over navigable waters of the United States.

S. 1876, § 1316(a)(3). The bill never left the Judiciary Committee, presumably since the proposed modifications did little more than codify the case law discussed earlier in this comment.

165 McDermott, supra note 142. Professor McDermott teaches at Loyola University School of Law, Los Angeles. His extensive background in the field of aviation law led the Ninth Circuit to ask for his help in studying the problems addressed by the Subcommittee.

166 114 CONG. REC. 9435 (1968); 114 CONG. REC. 28615 (1968). The author of the FJC study notes that Judge Hall “has unquestionably handled far more aviation litigation than any other federal or state judge and has been instrumental in getting the Federal Judicial Center and the Judicial Conference to consider [the aviation litigation] problem.” McDermott, supra note 142, at 5 n.12.

167 A fact emphasized by the FJC study’s focus on aircraft disasters involving hundreds of deaths, generating hundreds of suits across dozens of foreign countries. McDermott, supra note 142, at 6-7 (discussing In re Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975)). Since such catastrophes undoubtedly entail federal jurisdiction, they will not be discussed in this comment. For an in-depth examination of the multiparty, multidistrict dilemma, see Brackin, supra note 4.
the scope of this comment's jurisdictional focus, the conclusions from the study are certainly relevant to the admiralty/aviation topic. The contributors to the study agreed that a uniform body of substantive law should be applied to aviation cases, or at least to those originating from the same accident.168 Most importantly, the study analyzed the possible reasons behind the failure of the Tydings proposals with respect to the jurisdictional questions. The study found that although the Tydings bills found support within the federal judiciary, the major opponents, not surprisingly, came from the plaintiff's bar.169 These plaintiffs' attorneys opposed exclusive federal jurisdiction over aviation torts for several reasons. First, they stated that plaintiffs would lose more cases in federal courts than in state courts.170 Second, some expressed concern that transfer and consolidation in a single court would cause delay and additional costs.171 Finally, many plaintiffs' attorneys, as a general rule, favored an arena in which they could "forum-shop."172 The "plaintiff's bar" never had to further substantiate its arguments, since the Tydings bills, as noted earlier, failed to pass.173

Nevertheless, the FJC study found exclusive federal jurisdiction so crucial to the development of uniform substantive aviation law, that the contributors suggested that a bill be drafted dealing solely with procedural and jurisdictional matters.174 In this manner, disputes between the judiciary and private interests of the sort that killed the Tydings proposals could be restricted to procedural rather than sub-

168 McDermott, supra note 142, at 19.
169 Id. at 15-16 (citing Hearings on S. 3305 and S. 3306 before the Subcomm. on Improvements in Judicial Machinery, 90th Cong., 2d Sess. at 62-72, 80-89, 131, 176 (1968)) (citations omitted).
170 Id.
171 Id.
172 Id.
173 The plaintiff's bar has similarly opposed recent modifications to existing aviation law. For example, trial lawyers vigorously opposed the passage of Montreal Protocol 3, an attempt to raise the $75,000 liability limit imposed by the Warsaw Convention. Eloise Cotugno, Comment, No Rescue in Sight for Warsaw Plaintiffs From Either Courts or Legislature — Montreal Protocol 3 Drowns in Committee, 58 J. Air L. & Com. 745, 790-91 (1993).
174 McDermott, supra note 142, at 20.
stantive provisions, thereby increasing chances of reaching an agreement on at least those concepts.\textsuperscript{175} One possible manifestation of such a restricted bill had been proposed by Judge Hall in a speech delivered to the Federal Bar Association in September of 1974.\textsuperscript{176} The proposal takes sections of the Death on the High Seas Act (DOHSA)\textsuperscript{177} and alters them, creating a separate statutory scheme for aviation torts.\textsuperscript{178}

\section*{C. The Statutory Proposals — Revitalization in the 1990s?}

In the decade or so following the FJC study, most of the activity involving the aviation jurisdictional debate took place within the judiciary rather than the legislature. The majority of commentators focused on the decisions interpreting \textit{Executive Jet}\textsuperscript{179} and no mention was ever made of either the Tydings bills or the FJC study.\textsuperscript{180} Possibly the retirements of Senator Tydings and the late Judge Hall, two of the aviation industry's most formidable experts, bore

\begin{footnotesize}
\begin{enumerate}
\item The Honorable Pierson M. Hall, Remarks Delivered to the Federal Bar Association, Washington, D.C. (Sept. 6, 1974), \textit{in} McDermott, App. A.
\item Judge Hall suggested the following statute governing jurisdiction for aviation torts. The statute borrows portions from the Death on High Seas Act, 46 U.S.C. app. § 761 (1988).
\item 49 U.S.C. § 1433. Right of action; where and by whom brought. Whenever the death or injury of a person or loss of injury to any property shall be caused by wrongful act, neglect, or default occurring in "air commerce" or within the "special aircraft jurisdiction of the United States" as defined by § 101 of this Act as amended (49 U.S.C. 1301, et seq.) the injured party as to such loss of or injury to property and the personal representative of the decedent as to such death may maintain a suit for damages in the district courts of the United States, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. According to Judge Hall, this fictitious statute could serve as a cornerstone for a uniform system of federal aviation law. Hall, \textit{supra} note 176.
\item \textit{See supra} notes 25-34 and accompanying text.
\item The exception is the Brackin student comment cited \textit{supra} note 4. Mr. Brackin originally proposed the reintroduction of the Tydings bills \textit{in toto}, and the author of this comment hopes to "flesh out" his original proposition in more detail.
\end{enumerate}
\end{footnotesize}
some responsibility for the lapse in activity on the legislative front. The unpredictability and uncertainty in the courts, however, serve as a lengthy testimony to the continuing need for uniformity within aviation law.

When major aviation legislation directed towards uniformity eventually did return to the Congressional floor, it owed its reemergence not to a forward-thinking Senator or judge concerned with aviation's future legal instability, but rather to the nation's aviation industry and insurance carriers, focused on the bottom line. Between 1978 and 1985, the skyrocketing increase in accident liability costs drove many aircraft manufacturers out of business, and forced others to resort to excess liability policies burdened with massive deductibles. Consequently, in 1986 a series of Senate and House bills were introduced, all calling for uniform rules of liability for personal injury and property damage arising out of general aviation accidents.

House Resolutions 4142, 4717, and Senate Bill 2794 addressed, to varying extents, three aspects of tort law that had caused the most problems to general aviation manufacturers. House Resolution 4142, for example,

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182 The legislators have statutorily defined "general aviation aircraft" to mean powered aircraft with a seating capacity of less than twenty passengers and not currently engaged in scheduled passenger carrying operations. Kassebaum Amendment No. 1823, 99th Cong., 2d Sess. § 203 (1986). Since most of the cases discussed in this comment involved small aircraft being used for purposes other than passenger transport, the proposals could conceivably affect the decisions of similar cases in the future.


provided for a uniform federal law on aviation product liability, eliminated joint and several liability (except for defects in airplanes or their parts), and prohibited actions for injuries caused by products beyond their useful lives.\textsuperscript{187} In addition to these bills, Republican Senator Nancy Kassebaum of Kansas proposed an amendment to a separate Senate bill under consideration at the time.\textsuperscript{188} Despite strong arguments in favor of timely Congressional response, the 99th Congress adjourned without further action on any of the bills.

Soon after the opening of the 100th Congress, however, Senator Kassebaum introduced the first of many bills entitled the "General Aviation Accident Liability Standards Acts."\textsuperscript{189} In providing a rationale for her proposals, Senator Kassebaum expressed her view that the existing product liability environment had caused the "erosion of U.S. general aviation competitiveness."\textsuperscript{190} The Senator also commented on the fact that "[t]he Federal interest and presence in aviation is all pervasive except in one area — litigation is conducted under individual and widely varying state laws."\textsuperscript{191}

The Kassebaum proposal, substantially similar to its 1986 precursors,\textsuperscript{192} contains comprehensive rules on liability,
comparative responsibility, and remedial measures designed to ease the burden of liability insurance on aviation manufacturers. Included in the proposal is a statutory scheme of jurisdiction over aviation torts, which would give federal courts original jurisdiction concurrent with state courts in all civil actions involving injuries arising out of an aviation accident.193

The jurisdictional provisions of the Kassebaum proposals appear much more pro-defendant than the exclusive jurisdiction rules suggested by Senator Tydings and Judge Hall decades earlier.194 The bills fail to eliminate from admiralty is unfair to hold a manufacturer liable for a product even ten years after a sale, when many of its parts may have been changed or altered. 132 Cong. Rec. E2998 (daily ed. Aug. 15, 1986) (statements of Rep. Nelson).

193 S. 473, 100th Cong., Ist Sess. § 13 (1987). The full text of the statute reads as follows:

§ 13. (a) The district courts of the United States, concurrently with the State courts, shall have original jurisdiction, without regard to the amount in controversy, in all civil actions for harm arising out of a general aviation accident and in all actions for indemnity or contribution.

(b) A civil action which is brought in a State court may be removed to the district court of the United States for the district embracing the place where the action is pending, without the consent of any other party and without regard to the amount in controversy, by any defendant against whom a claim in such action is asserted for harm arising out of a general aviation accident.

(c) In any case commenced in or removed to a district court of the United States under subsection (a) or (b) of this section, the court shall have jurisdiction to determine all claims under State law that arise out of the same general aviation accident, if a substantial question of fact is common to the claims under State law and to the Federal claim, defense, or counterclaim.

(d) (1) A civil action in which the district courts of the United States have jurisdiction under subsection (a) of this section may be brought only in a district in which -

(A) the accident giving rise to the claim occurred; or

(B) any plaintiff or defendant resides.

(2) In an action pending in a district court of the United States under paragraph (1) of this subsection, a district court may, on motion of any party or its own motion, transfer the action to any other district for the convenience of parties and witnesses in the interest of justice.

Id. This provision has remained similar in all subsequent versions of the General Aviation Accident Liability Acts prior to 1993.

194 See supra notes 145-49 & 158 and accompanying text.
all aviation cases; rather, they simply ensure that federal courts may share jurisdiction over aviation cases that would not otherwise qualify for a federal forum on separate grounds. In some cases — such as *City of New York v. Waterfront Airways*, where admiralty provided a sole basis for filing a federal suit — the Kassebaum bill would certainly help by leaving no question as to proper jurisdiction. The main shortcoming of the proposals arises when considering cases such as *Offshore Logistics, Inc. v. Tallentire* and *Icelandic Coast Guard v. United Technologies Corp.*, where the courts have uniformly allowed admiralty law to apply in cases involving helicopter crashes in international waters. In these cases, the defendants could not recover for damages not traditionally recognized under admiralty law. The Kassebaum proposals, by providing for concurrent rather than exclusive jurisdiction, simply add yet another basis for federal jurisdiction to such accidents. This would subject both parties to even more confusion within the procedural maze harboring borderline admiralty/aviation cases.

In addition, although the proposals provide some measure of predictability via the preemption rules for conflicting state laws, it is unclear whether the Kassebaum provisions will override statutory damage provisions such as state wrongful death statutes and the Death on the High Seas Act. While the proposal does explicitly apply to

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195 Wells, supra note 181, at 931. Wells does not address the admiralty problems in his Comment.
196 See supra notes 82-89 and accompanying text.
199 Kassebaum Amendment No. 1823, 99th Cong., 2d Sess. at § 204. The text of the preemption provision reads as follows:
   § 204 (1986). (a) This title supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this title establishes a rule of law or procedure applicable to the claim.
   Id.
200 All states have statutes governing wrongful death claims. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984).
death resulting from bodily injury,\textsuperscript{202} it does not set limits on recovery. Instead, the bill simply limits punitive damages to the extent that "the claimant establishes by clear and convincing evidence that the harm suffered was the direct result of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved."\textsuperscript{203} Absent any actual provision for wrongful death, state and existing federal provisions must presumably still apply. Thus, the Kassebaum proposals do not address the problems of DOHSA and state law preemption, at least where issues other than punitive damages are concerned.

No provisions exist for recovery of economic damages, such as loss of income or replacement costs. The proposals do, however, allow for the potential recovery of emotional distress damages,\textsuperscript{204} a category not recognized under admiralty law.\textsuperscript{205} Plaintiffs of general aviation cases could therefore apply the Kassebaum proposals, overriding admiralty law, at least to the extent that the suit involves damages for emotional harm.

Hence, for the purposes of the jurisdictional dilemma, the Kassebaum proposals only provide an alternative forum for aviation torts, rather than eliminating the confusion of admiralty law. This confusion cannot be entirely unexpected because the stated purpose behind the bill is to "limit the liability of a general aviation manufacturer to those situations where, through fault of the manufacturer, its product causes an injury," rather than to clean up the judicial mechanism.\textsuperscript{206} The jurisdictional provisions only serve as a means, not as an end. In contrast, the Tydings bills of the 1960s appear much more effective in achieving

\textsuperscript{202} Kassebaum Amendment No. 1823 at § 203(6)(B).
\textsuperscript{203} Id. § 210.
\textsuperscript{204} Id. § 204(6)(D).
\textsuperscript{205} See supra notes 130-34 and accompanying text for discussion of \textit{Morgan v. United Air Lines}, 750 F. Supp. 1046 (D. Colo. 1990). Note that the facts of \textit{Morgan} involved a commercial flight and would therefore not fall under the "general aviation" category required by the Kassebaum proposals. See supra note 182.
\textsuperscript{206} Wells, \textit{supra} note 181, at 934.
jurisdictional uniformity by foreclosing a procedural branch rather than adding another option. What the newer bills do accomplish is to publicize the notion that aviation tort cases belong in the federal courts as opposed to state courts.

Unfortunately, the many disputes over such a wide-ranging bill proved insurmountable, and the 100th Congress killed both Senator Kassenbaum's 1987 proposal and a similar House bill\textsuperscript{207} introduced the same year.\textsuperscript{208} The 101st Congress had the opportunity to consider virtually identical bills introduced in 1989, but again failed to pass either provision.\textsuperscript{209} A Senate report given by the Committee on the Judiciary outlined specific reasons for their rejection of the bills. Most of the criticisms focused on policy reasons, such as the difficulty of blaming the aviation industry's decline solely on liability insurance.\textsuperscript{210} In response to the argument that extensive federal regulation of the aviation industry warranted uniform federal law, the Committee remarked that

\begin{quote}
[the] general aviation industry is one of many industries that are subject to limited Federal safety controls. . . . The creation of national product liability standards for the general aviation industry is contrary to historical precedent and would establish a dangerous standard to follow. Unlike the areas of patent or admiralty law, there is no special historical or constitutional precedent that would support national standards for aviation law.\textsuperscript{211}
\end{quote}

Furthermore, the Report took exception to many of the substantive provisions of the bill, including the jurisdictional portion. Specifically, the Report stated that the provisions allowing concurrent state and federal jurisdiction

\begin{itemize}
\item \textsuperscript{208} See Wells, supra note 181, at 897 n.9 (citing Bradley, Aircraft Manufacturers Hope Congress Faces Products Liability Issue, \textit{Wichita Bus. J.}, Aug. 28, 1989, at 13 col.1.).
\item \textsuperscript{210} S. Rep. No. 303, 1990 WL 259304, at 3.
\item \textsuperscript{211} Id.
\end{itemize}
over aviation cases would waste federal judicial resources and complicate decisions by creating fifty different interpretations of the bill in addition to additional versions in the federal courts.\(^{212}\)

**D. Future Hopes — Where Do We Go From Here?**

During the three years following the unfavorable Senate Report, Senator Kassebaum introduced two more versions of her aviation proposal.\(^{213}\) Perhaps in an effort to appease the many opponents of the bills, the newer jurisdictional sections granted federal concurrent jurisdiction of general aviation cases only in actions where the amount in controversy exceeds $50,000.\(^{214}\) This new restriction does little more than weaken an already questionable provision. The restriction would predictably compel individual plaintiffs, with smaller claims, to resort increasingly to admiralty grounds in order to gain the advantages of federal jurisdiction when unable to assert the rules of the Kassebaum bills.

At any rate, Congressional inaction again prevailed and none of the proposals had passed by the close of the 103rd Session. After several years of unsuccessful attempts with the General Aviation Accident Liability Standards Acts, Senator Kassebaum introduced the General Aviation Revitalization Act of 1993 on September 14, 1993.\(^{215}\) The new bill dealt solely with creating a fifteen-year statute of repose on civil actions brought against aircraft manufacturers or manufacturers of general aviation component parts.\(^{216}\) The restricted scope of the new bill substantially increased its

\(^{212}\) Id. at *6.


The author would like to thank Mr. Michael J. Horak, Press Secretary to Senator Kassebaum, for providing timely help and information related to this legislation.

\(^{216}\) Id.
chances for passage, initially garnering the support of more than a third of the Senate roster, whereas a House version signed on nearly half of the Representatives as cosponsors.217 Because the new bill did not change any product liability laws related to rules of evidence, punitive damages, or jurisdiction, the bill stood a much greater chance of passing than Senator Kassebaum’s earlier, more comprehensive bills.218 The Senator’s revised strategy finally paid off when President Clinton signed Senate Bill 1458 into law on August 17, 1994.219

From the success of Senate Bill 1458, it seems reasonable to predict that a piecemeal approach to revising the system of aviation litigation may be in process. Given the difficulties in passing legislation as broad as the General Aviation Liability Acts proposed between 1986 and early 1993, the better tactic appears to be to introduce statutory provisions gradually over a period of time. For now, however, no one appears actively concerned with promulgating uniform jurisdictional rules related to aviation torts.

VI. CONCLUSION

Given the judicial inconsistencies and uncertainties inherent in applying admiralty law to aviation torts, and the seemingly fortuitous circumstances that require maritime law to be invoked, this comment suggests that litigants in borderline aviation/admiralty cases no longer risk asserting admiralty as a separate jurisdictional grounds for filing in federal courts. Possible solutions to this problem have recently been proposed, with the jurisdictional provisions under the Kassebaum bills providing for a uniform system of laws governing aviation accidents. Because of the rela-


tively restricted scope of these bills, however, their impact on the procedural problems may prove minimal.

The better solution would be to reintroduce the Tydings proposals of the 1960s. By vesting exclusive jurisdiction over all aviation torts, rather than solely those involving general, non-commercial aviation manufacturers, more predictability would benefit litigants and fewer procedural obstacles would clutter the federal and state dockets. Furthermore, with the general trends towards uniform rules for the aviation industry, exclusive federal jurisdiction ensures a corresponding uniformity in application.

It seems appropriate close by taking note of the late Judge Pierson Hall's remarks at a Federal Bar Association meeting, in which he lamented the legislature's disregard of the Tydings bills ever since Senator Tydings retired from the Senate.220

I was thinking one night of the number of directions from which an object moving on land could be hit by another object moving on land. Well, there are 360 degrees to the compass, so he could be hit from 360 different points.

I then pondered about an object moving in the sea being hit by another object moving in the sea. That turned out to be 180 times 360 — 64,800 different points.

Of course, my curiosity then took me to the collision of objects moving in the air, and, that is 360 times 360, and it turns out that such an object can be hit from 129,600 directions or points of the compass.

So why shouldn't there be a separate law of the air?221

The federal courts have a law of the land, a law of the sea — so why not a law of the air? Admiralty and aviation simply do not mix. Those that attempt to combine the two, naturally do so at their own risk.

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220 See supra note 176.
221 Id.
Articles