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MARITIME AVIATION LOSSES AND CONFLICT OF LAWS

A. J. Thomas, Jr.*

INTRODUCTION

CONFLICT OF LAWS problems arise in the maritime area upon the national and international level. On the national level the maritime law and maritime affairs are constitutionally regarded as federal matters, for admiralty and maritime jurisdiction is a portion of the judicial power conferred upon the courts of the United States. Article II, Section 2 of the United States Constitution provides among other things that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. Nothing, however, is stated regarding the substantive law which is to be applied to a case arising within the admiralty jurisdiction. A corpus of general maritime law had arisen from European codes and practices at the time of the adoption of the United States Constitution.1 This general maritime law was considered to have been received or incorporated into the American law to be applied in maritime cases.2 The maritime law of the nation has come from this body of traditional rules, subject to court modification and change requisite to meet the maritime needs of the United States. The maritime law not only encompasses the general maritime law, but also statutes of Congress.3

* A summary of the ancient sea codes may be found in Thompson v. The Catharina, 23 F. Cas. 1028 (D. Pa. 1795) (No. 13,949).

** See G. Gilmore & C. Black, The Law of Admiralty 45-46 (1975). Herein are discussed the theories relative to the receipt or incorporation of this law.

**Id. at 47; see also N. Healey & D. Sharpe, Admiralty Cases and Materials 1-27 (1974); G. Robinson, Handbook of Admiralty Law in the United States 9-13 (1939).
If the maritime law is a federal matter, how can there be conflicts on the national level as to whether federal or state law should be controlling in a case having a connection with navigable waters and maritime concerns? In the first place not everything which might have some connection to things maritime, such as mere maritime locality, has been considered by the courts to be within the admiralty judicial or legislative jurisdiction. If the subject matter is non-maritime on the national level in the United States, then the law of some state should obviously govern. Thus a court decision that a set of facts is non-maritime will draw a line between federal and state powers and jurisdiction. Even if the facts of the case clearly indicate that the transaction and the parties to the transaction are engaged in an activity of a maritime nature so as to be within the admiralty jurisdiction and fall within established precedent, there may still be instances when state law is to govern, for the federal maritime power has not been construed by the Supreme Court to be exclusively federal in all instances. In those instances where that uniformity necessary to meet the needs of the shipping industry is not demanded, but diversity of law can be permitted, then state law can be applied.

Conflict of laws problems may also arise on the international level, for there may well be situations when the law of a foreign nation should control even though the forum may be a court in the United States. Choice of law principles may well indicate that a United States statutory rule should not be applied when a differing and proper foreign rule should govern. Although it might be advantageous if general admiralty principles were uniform worldwide, this is far from the case. Different interpretations of rules and even differing rules prevail, so that a choice must be made as to which interpretation or which rule controls. Here conflict of laws principles tell the court which rule or interpretation to select.

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4 See the discussion pertaining thereto in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253-61 (1972).


6 See Gilmore & Black, supra note 2, at 51-52.
THE NATIONAL LEVEL

Maritime law has to do with the sea and navigable waters. It relates to vessels and their crews, to navigation and to the marine transport of persons and property. As such, aircraft and air transport would appear to be unlikely candidates for admiralty jurisdiction and maritime law, and for the most part have been excluded therefrom. Thus, the airplane is not generally the subject of a maritime lien as is a vessel. The Limitation of Liability Act does not permit owners of aircraft to limit liability, for this act, by its terms, applies only to vessels. The maritime principle of general average would seem to have no application to the airplane. The Air Commerce Act of 1926 exempted aircraft from compliance with navigation and shipping laws, but seaplanes, while afloat, are now made subject to the International Rules of Navigation.

Nevertheless, in a limited number of circumstances the courts have brought aircraft into admiralty. In an early case a seaplane while afloat was considered to be within the admiralty jurisdiction. Authority exists which holds that a seaplane which crashes into navigable waters is a fit subject of salvage and of a maritime lien for such salvage. Of more importance than these limited circumstances, in the opinion of the author, are three cases in which courts have treated an airplane that has crashed into navigable waters as a proper subject of admiralty litigation.

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7 Comment, 64 COLUM. L. REV. 1084, 1089 (1964); see United States v. Northwest Air Serv., Inc., 80 F.2d 804, 805 (9th Cir. 1935).
10 See Crenshaw, supra note 9, at 576.
13 See, e.g., Knauth, Aviation and Admiralty, 6 AIR L. REV. 226 (1935); Veeder, The Legal Relation Between Aviation and Admiralty, 2 AIR L. REV. 29 (1931).
15 Lambros Seaplane Base v. The Batory, 215 F.2d 228 (2d Cir. 1954). The salvage award was discussed on other grounds. Therefore the case is not a clear-cut decision that an admiralty lien will attach. The case is discussed in GILMORE & BLACK, supra note 2 at 540. And see a recent case, Anthony Mark v. South Continental Ins. Agency, Inc., 1978 A.M.C. 519, which also held that an airplane crashing in navigable waters was a proper subject of admiralty.
instances of aircraft and admiralty jurisdiction is the fact that admiralty jurisdiction has been extended even to land-based aircraft in cases of maritime tort, although there has been retraction of such jurisdiction in certain instances where the tort arose from an airplane which crashed into waters within one marine league from shore.

In several cases arising from a crash within Boston Harbor—and despite the fact that precedent at the time declared that there was no general principle of maritime law creating an action for wrongful death—federal courts held that admiralty jurisdiction was present because the situs of the claim was within a maritime locality, i.e., the crash and the alleged wrong occurred in navigable waters. In these cases the action itself would be based upon the proper governing state's wrongful-death statute. The cases were founded on the premise that admiralty jurisdiction in tort could be based merely upon maritime locality despite the fact that no maritime relationship or activity was involved.

These cases were overruled by the Supreme Court of the United States in Executive Jet Aviation, Inc. v. City of Cleveland. The Court held that maritime locality alone was not sufficient for admiralty jurisdiction in a tort action. In this case a plane enroute from Cleveland to Portland, Maine, lost power upon ingestion of birds and fell, striking a perimeter fence at the Cleveland Airport and finally crashing into Lake Erie, a maritime locality. The crash occurred approximately one-fifth of a mile from shore. No injuries resulted. Executive Jet Aviation brought suit against


17409 U.S. 249 (1972).

18 Controversy had long existed on the question of maritime jurisdiction in tort. The old case of The Plymouth would determine the question of whether a tort was maritime upon the locality of the wrong. The Court said: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." 70 U.S. (3 Wall.) 20, 36 (1865). See also the Supreme Court's language in Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971). Some cases disagreed with the locality test and set forth a view that there must in addition be a maritime connection for the attachment of admiralty jurisdiction in tort. For a collection of cases pro and con see J. Lucan, Admiralty Cases and Materials 104-06 (2d ed. 1978). See also the extended discussion by the Supreme Court in Executive Jet Aviation, Inc. v. City of Cleveland, supra note 4.
the City of Cleveland for the loss of the plane, alleging the city’s negligence in failing to keep the airport free of birds or in failing to give notice of their presence.

A lower court had held that the tort had occurred on land prior to the final crash into the water.\(^{19}\) Thus, according to this decision there was no maritime tort for there was no maritime locality. The Supreme Court affirmed, but refused to decide the exact locality of the tort. Instead, it was of the opinion that, even if the plane came down on water so as to have a maritime locality, locality alone could not make for admiralty jurisdiction or for the application of maritime law in the absence of statutory authority. The Court stated that the tort must bear “a significant relationship to traditional maritime activity.”\(^{20}\) The Court went on to say that there was no admiralty jurisdiction “over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.”\(^{21}\) Such a cause of action is purely a state matter calling for application of state laws, including state choice of law principles.\(^{22}\)

After deciding that a maritime locality test alone was not sufficient, but that, in addition, a traditional maritime activity was necessary for an assumption of maritime jurisdiction, the Court turned to the issue of whether an aviation maritime tort could ever bear a sufficient relation to traditional maritime activity to be considered within admiralty. On this point the Court said:

It could be argued, for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels. Moreover, other factors might come into play in the area of international air commerce—choice-of-forum problems, choice-of-law problems, problems involving multi-nation conventions and treaties, and so on.\(^{23}\)

\(^{19}\) Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971), aff’d, 409 U.S. 249 (1972).

\(^{20}\) 409 U.S. at 268.

\(^{21}\) Id. at 274.

\(^{22}\) Id. at 272-73.

\(^{23}\) Id. at 271-72 (footnote omitted).
On the other hand, maritime relationship or activity could not be found with respect to "an event [such as that occurring in Executive Jet] befalling a land-based plane flying from one point in the continental United States to another." Such a fact situation did not involve navigation and commerce on navigable waters.

A scattering of aviation cases have been decided by lower federal courts since Executive Jet. Some courts have been able to discover a sufficient maritime connection, in addition to maritime locality, to sustain admiralty jurisdiction. In Higginbotham v. Mobil Oil Corp., a helicopter crashed while ferrying workmen to a drilling platform in the Gulf of Mexico one hundred miles from the Louisiana coast. Suit for damages was brought by representatives of those who had perished in the crash. The test of maritime locality was met because the accident occurred on the high seas. The maritime activity test was also considered to have been met because the helicopter was performing the functions of a vessel, specifically those of a crew-boat. Since the aircraft was neither performing a function of a land-based aircraft nor operating between points within the continental United States, but instead was operating as a vessel, it was engaged in a maritime activity.

The fact that the crash occurred between points in the United States and not on the high seas seems to be the distinguishing feature in Teachey v. United States. A Coast Guard rescue helicopter, after successfully completing an air-sea rescue from a sinking shrimp boat in the Gulf of Mexico, landed at Key West for refueling. Thereafter it crashed off St. Petersburg, Florida. The court held that the flight from Key West to St. Petersburg was a flight by a land-based aircraft between points within the continental United States. Thus the language of Executive Jet controlled. The court did not rule concerning the contention that rescue at sea was traditionally a function carried on by vessels.

24 Id. at 272.
25 A discussion of some of these cases may be found in Note, 8 CASE W. RES. J. INT’L L. 220 (1976); Note, 9 VAND. J. TRANSNAT’L L. 158 (1976).
27 Id. at 1167.
29 Id. at 1199.
Maritime relationship was also found in *Hark v. Antilles Airboats, Inc.*, which involved a crash by a seaplane into the harbor at St. Thomas, Virgin Islands, before the takeoff phase of the flight had been completed. The destination was St. Croix, Virgin Islands. The takeoff of a seaplane on navigable waters was thought to have a maritime flavor. The court also stressed the maritime character, for despite the fact that the flight was between two United States points, much of the journey took place over the high seas. *Executive Jet* seemingly was to be restricted to flights between points in the continental United States.

*Roberts v. United States* latched on to the notion that transoceanic transport of cargo was a traditional maritime activity, noting the obvious, that in former times such shipping could only be performed by waterborne vessels. Here the claims arose from the crash of a private cargo plane into navigable waters as the plane was approaching an airbase in Okinawa on a flight from Los Angeles to Viet Nam. The court in *T. J. Falgout Boats, Inc. v. United States* was also influenced by tradition prior to the advent of aviation. In that case a Navy jet released a missile which struck a ship in California navigable waters. In the ensuing suit by the vessel’s owner, the court found maritime connection with the following language: “[B]efore the birth of aviation, the firing at sea of explosive projectiles was performed only by waterborne vessels.” Supporting reasons for maritime activity were cited: the release of the missile over navigable waters created a potential hazard to navigation; and further, the United States Navy existed for the purpose of operating ships and aircraft in, on, and over navigable waters.

Nevertheless, the court deciding *American Home Assurance Co. v. United States*, as in *Teachey* and unlike *Roberts, Falgout Boats*, and *Higginbotham*, refused to be influenced by the traditional maritime function contention that the crash, occurring on a flight from

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31 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 1070 (1974).

32 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975).

33 Id. at 857.

Atlantic City, New Jersey, to an island off New York's coast, was caused by inclement weather. Since weather problems were traditionally the *bete noire* of seamen, it was argued that a traditional maritime connection was present. The court was unimpressed, being of the opinion that coping with weather conditions was also a problem of other vehicles and therefore not unique to seagoing vessels or aircraft flying over the sea.

A final case worthy of mention is *Hammill v. Olympic Airways*, S. A.\(^{35}\) Here the wrongful-death action grew out of a crash in Greek territorial waters while the plane was on an approach to the Athens airport. One passenger killed was a United States citizen domiciled in Virginia. The court again based its decision on the fact that the flight served a purpose that had been traditionally carried on by ships. The fact that it was not a transoceanic journey was discounted, for the court stressed the fact that parts of the flight occurred over international waters, and, further, a flight between an island and the mainland was traditionally a function of a surface vessel.

Issue can be and has been taken with the decisions of these courts in the light of *Executive Jet*, but it must be admitted that the dicta of that case which would permit an aviation tort to satisfy a maritime nexus in some instances is at best vague and contributes to uncertainty with respect to the extension of admiralty jurisdiction in the case of the maritime tort possessing certain sea or navigable water connections. That which the Court appears to be emphasizing for the proper maritime connection necessary to bring the matter within admiralty jurisdiction is either a flight outside the jurisdiction of the United States and over international waters avoiding "choice-of-forum problems, choice-of-law problems, international law problems, problems involving multi-nation conventions and treaties, and so on,"\(^{36}\) or a traditional and significant maritime function. Sometimes both appear requisite, at other times only one.

Somewhat akin to the maritime tort and admiralty jurisdiction is the problem of implied warranty—aircraft—and the admiralty jurisdiction. Two viewpoints exist here—one refusing to allow an


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action for breach of a warranty of fitness of the aircraft within the jurisdiction, and the other believing that such a cause of action can, in instances, be considered maritime. Although a contract to repair a ship is considered to be a maritime contract, a contract to build a ship has been deemed to be outside admiralty's purview.\(^7\) Such contracts have not been considered sufficiently related to rights and duties pertaining to maritime commerce or navigation. This rule, though subjected to much criticism, would be an obstacle to admiralty jurisdiction for breach of implied warranty in the manufacture of an aircraft. Moreover, even if such an obstruction could be overcome it would seem that some maritime connection would be requisite to permit admiralty to be seized of jurisdiction. In \(\textit{Weinstein v. Eastern Airlines, Inc.}\),\(^8\) a predecessor of \(\textit{Executive Jet}\), admiralty jurisdiction for maritime tort based upon maritime locality alone was recognized. An action against the manufacturer of the plane for breach of implied warranties of fitness and merchantability was refused. The Court was of the opinion that this was not a maritime contract, for such contracts rested upon obligations maritime in nature which required the performance of maritime services or had to do with maritime transactions.\(^9\) The contract was not believed to be of such nature, for involved here was a transaction covering the manufacture "of a land-based aircraft and a contract of carriage by air between two cities on the United States mainland."\(^10\) Mere maritime situs because of a crash in navigable waters was thought to be incidental; it did not change the character of the contract.\(^41\)

The decision in \(\textit{Montgomery v. Goodyear Tire & Rubber Co.}\)\(^42\) distinguished \(\textit{Weinstein}\) and embraced admiralty jurisdiction. In

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\(^8\) 316 F.2d 758 (3d Cir.), \textit{cert. denied}, 375 U.S. 940 (1963). Noel v. United Aircraft Corp., 204 F. Supp. 929 (D. Del. 1962), also takes a position that admiralty as a matter of law and policy does not take cognizance of a breach of implied warranty. Here there was an action brought under the Death on the High Seas Act against a manufacturer of propellers used on a plane that crashed on the high seas.

\(^9\) 316 F.2d at 766.

\(^10\) \textit{Id.}

\(^41\) \textit{Id.}

addition to a suit sounding in tort, the libellants alleged a breach of implied warranty against Goodyear for negligent manufacture of a Navy balloon. The balloon crashed on the high seas. The claims were based on the Death on the High Seas Act which grants rights of recovery for negligent acts causing death on the high seas. The court concluded that an action grounded on a breach of implied warranty would lie under the Act. The Weinstein case was distinguished on the ground that the airplane's route in Weinstein was not primarily over water as was that of the balloon. A more substantial maritime connection was found in that the balloon was manufactured for the Navy, and was intended to be used over water. It was stated: ``Given these facts, it was more likely than not that a crash would take place over the water, and so within admiralty jurisdiction.''

To overcome the fact that admiralty does not take cognizance of contracts to build a vessel, the court mentioned that cases had recognized implied warranties of workmanlike service as analogous to a warranty by a supplier of the fitness of his product. Thus, it was easy to take an additional step to recognize implied warranties in an admiralty action, ``especially when the warranties cover an airship intended for flight over water and sold to the United States Navy.'" It was also noted that the recent trend was to characterize personal injury and death actions, though based on warranty, as in the nature of tort rather than as contract actions. Since the case arose prior to Executive Jet, the court believed that as to a tort action maritime locality was all that was needed for an exercise of jurisdiction.

A later case, Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, reached a similar result. This case also involved a suit under the Death on the High Seas Act issuing from the crash of a helicopter in the Gulf of Mexico while ferrying employees of an oil company to an off-shore oil rig. Here, the only maritime connection was maritime locality, i.e. the aircraft was

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44 231 F. Supp. at 455.
45 Id. at 453.
46 Id. at 454.
47 Id.
operating over water. It would seem that after *Executive Jet* the maritime connection or activity required by that case would have been met. The fact that the aircraft was operating in international waters, and was performing a traditional function of a crew-boat might be sufficient, but if we follow *Montgomery*, it might be well that the manufacturer had no knowledge that there was intention to use the aircraft on the high seas at the time of the manufacturing process.

If an aviation tort or a cause of action based upon implied warranty can be considered within the maritime jurisdiction, what law is to govern the substantive legal issues in the case? In the cases discussed, federal statutes or the general maritime law as viewed by the United States controlled. It should be pointed out that on a national level, and even when the case is one considered maritime, the maritime law does not always apply. State law is not always dispossessed in maritime cases. If the matter thought maritime is local in scope so as not to require uniform and harmonious working of the federal maritime legal system, the court may resort to state law. Unfortunately no clear-cut criteria exist to inform us with certainty as to when uniformity is required or diversity of laws permitted. Proceeding on an *ad hoc* case basis is not only warranted, but requisite.

*Erie Railroad Co. v. Tompkins* and *Klaxon Co. v. Stentor Electric Manufacturing Co.* require the application of the law of the state in which a federal court is sitting in a case arising under diversity of citizenship jurisdiction. In such a case the federal courts

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50 For certain cases holding that an application of state law would upset the harmony required for the maritime law and maritime affairs, see Kossick v. United Fruit Co., 365 U.S. 731 (1961); Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); Taylor v. Crain, 224 F.2d 237 (3d Cir. 1955).

On the other side of the coin, where state law was permitted to displace the maritime law, see Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). Specifically as to aircraft and admiralty, see King v. Pan American World Airways, 270 F.2d 355 (9th Cir.), *cert. denied*, 262 U.S. 928 (1959), where, in a claim based on the Death on the High Seas Act, the court held that such act was not preemptive of a state's exclusive workmen's compensation statute. On this subject generally, see *Gilmore & Black*, *supra* note 2, at 47-51; Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 *SUP. CT. REV.* 158.

51 *Gilmore & Black*, *supra* note 2, at 49-50.

52 304 U.S. 64 (1938).

53 313 U.S. 487 (1941).
are also bound to the state’s choice of law principle. The extent of the application of the rules of the two above-mentioned cases has not been a subject of much judicial decision vis-a-vis maritime cases. *Scott v. Eastern Air Lines, Inc.*, however, held that if the tort was maritime, it was to be governed by federal choice of law principles. Apparently the decision rested on the thought that uniformity in maritime affairs was required. The federal choice of laws principles, when applicable, would usually fall within the idea of a federal common law or be regarded as general principles of admiralty law.

Of course state choice of law principles have no relevance to a case when the choice of law is between federal maritime law and the law of a foreign country, *i.e.*, a conflict of laws problem on an international level. Here federal choice of law principles control. Thus federal choice of laws principles for a maritime cause on the national as well as on the international level would ostensibly be the same and can be discussed together.

**The International Level**

The Death on the High Seas Act (DOHSA), section 761, creates a cause of action for wrongful death “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 language of this act of Congress has been held to encompass causes of action for wrongful death which arise out of crashes of land-based aircraft on or into the high seas. Moreover, the act has been held applicable when the action arose on an airplane flying over the high seas which never came in contact with the water. The extension of the act to aviation wrongful-death actions on the high seas was based on a literal reading of the statute, the language of which was not

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54 399 F.2d 14, 17 (3d Cir.), cert. denied, 393 U.S. 979 (1968); see also Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955).


confined to seaborne vessels, and the fact that the crash and action arose in a maritime locality.\(^5\)

The extent of the coverage of the DOHSA is not clear. As seen, it has application to deaths caused by wrongful act beyond a marine league from shore—on the high seas. Insofar as its provisions apply, no conflict of laws problems exist, for an American court will be obliged to apply the federal statute as the supreme law of the land. State or foreign law goes out the window and uniformity under this section replaces diversity. Nevertheless, section 764 of the act recognizes that there is room, even need, for the operation of a proper foreign law, for it proclaims:

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.\(^5\)

Until the 1970 case of *Moragne v. States Marine Lines, Inc.*\(^6\) there was no federal common law maritime remedy for wrongful death, although the DOHSA provided such a remedy if the death occurred on the high seas. In *Moragne* a maritime common law remedy was created by the court as a general principle of maritime law. Cases following *Moragne* indicated that recovery in wrongful death on the high seas could be predicated either on the DOHSA or upon the general maritime law.\(^6\) A recent Supreme Court decision disagrees and rules that such recoveries are governed by the DOHSA.\(^6\)

Admiralty jurisdiction also extends to personal injury cases where death does not result, as well as to property injury cases, where such actions arise from aircraft accidents over the high seas.

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This extension was noted by the Supreme Court in *Executive Jet.* Such cases were considered to be maritime torts because of maritime locality and because there was a maritime relationship. The aircraft involved were beyond state territorial waters on transoceanic flights. They were therefore performing a function traditionally and previously performed before the air age by ships.

Death and personal injury proceedings are then cognizable in admiralty. Applicable law will be the DOHSA or the general maritime law. Nevertheless, there may well be, and there are, fact situations where the application of American law should not be proper even though the case is brought before an American court as the forum. Indeed section 764 of the DOHSA recognizes, and the general maritime law agrees, that general maritime choice of law principles will at times call for foreign law to govern the issues before the court.

Earlier conflict of laws theories stressed the law of the place of injury or wrong as controlling in tort cases. Based on the fiction that a vessel was an extension of the state, the courts concluded that a maritime tort on the high seas would be governed by the law of the state whose flag the vessel flew. This law was relied upon as the law of the place of injury. Such a maritime tort, involving only a single ship or place, would be governed by the law of the flag of that vessel or plane. The problem became more difficult when two or more vessels with differing flags were involved. Here confusion existed with some authority applying the law of the forum, other the law of the vessel carrying the injured party, and still other the law of the vessel which caused the injury.

In any event, the old vested rights theory based upon legislative jurisdiction of a particular territorial state has given way to "governmental interests" and "significant relationship" theories in admiralty as well as in conflict of laws generally. Therefore, the law of the state of the flag would not necessarily be the law to be chosen simply because that state, and that state only, had jurisdiction to

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create rights. Emphasis is now placed upon the application of the law of the place having the most significant interest or relationship to the issue at hand for decision.\textsuperscript{66}

Although the case of \textit{Lauritzen v. Larsen}\textsuperscript{67} was not concerned with a maritime tort on the high seas, but with the question as to whether a Danish seaman could recover for negligence under the Jones Act, the Supreme Court of the United States indicated that the court should engage in a weighing of contacts test in order to determine whether American law or the law of some foreign nation having contact with the fact situation should be applicable. This notion was later extended in \textit{Romero v. International Terminal Operating Co.}\textsuperscript{68} In this case it also became clear that the \textit{Lauritzen} principle and contacts were intended to guide the courts in the application of the maritime law generally. Seven points of contact were set out in \textit{Lauritzen} to serve as guideposts for choice of law: the place of the wrongful act, the vessel's flag, the allegiance or domicile of the injured, the allegiance of the ship owner, the place of contracting, the inaccessibility of a foreign forum, and the forum.\textsuperscript{69} In a later case, \textit{Hellenic Lines v. Rhoditis},\textsuperscript{70} it was determined that the seven guideposts of \textit{Lauritzen} were not intended to be exhaustive for another factor was added—the ship-owner's base of operations.\textsuperscript{71}

A series of cases brought for wrongful death on the high seas have followed the theory of these Supreme Court cases. In \textit{Noel v. Airponents, Inc.},\textsuperscript{72} a New Jersey federal district court had before it an action arising from a death caused by the crash of a Venezuelan airliner on the high seas. Libellants claimed that American law controlled, specifically the DOHSA. Respondent claimed that the law of Venezuela should be applied, inasmuch as

\textsuperscript{66} For a short history of conflict of laws theories see R. Leflar, \textsc{American Conflicts Law} 6-7 (1968). \textit{See also} H. Goodrich \& E. Scoles, \textsc{Conflict of Laws} 3-9 (4th ed. 1964).
\textsuperscript{67} 345 U.S. 571 (1953).
\textsuperscript{68} 358 U.S. 354 (1959).
\textsuperscript{69} 345 U.S. at 583-91. For discussion of these cases see H. Baer, \textsc{Admiralty Law of the Supreme Court} § 5-1 (2d ed. 1969).
\textsuperscript{71} 398 U.S. at 309.
\textsuperscript{72} 169 F. Supp. 348 (D.N.J. 1958).
the traditional maritime law would point to the application of the law of the flag to a tort occurring on a vessel on the high seas. The court disagreed, pointing out the following facts: no action for wrongful death was permitted by Venezuelan law; the claim for damages was not against a Venezuelan carrier, but against an American corporation which had serviced the plane before its departure from New York; and the decedent, as well as the plaintiffs, were American nationals. The court then concluded that neither the Venezuelan carrier nor the state of registry, Venezuela, had an interest in the litigation. Therefore, according to the *Lauritzen* formula the claim was governed by American law, the DOHSA. The court quoted from *Lauritzen* as follows:

Maritime law like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.73

*Noel v. United Aircraft Corp.*74 also involved the death of an American citizen caused by the same crash. The case was before a Delaware United States district court. The defendant, as in the previous case, was an American citizen. Again it was claimed that the case should be governed by Venezuelan law, the law of the airline's flag. Experts on Venezuelan law agreed that recovery was precluded under Venezuelan law, but it was also shown that Venezuela's choice of law principles would look not to the law of the flag, but to the law of the place where the negligence occurred, which was the United States. The court then became concerned with the principles of renvoi; that is, the forum was looking to the conflict of laws principles of the foreign state rather than to its internal law. By so doing the court was referred by the foreign conflicts rule back to the law of the forum, the place of negligence. This can result in a game of international lawn tennis with the case never being decided until the law of some concerned state

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73 *Id.* at 351 (quoting from *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953)).
The court apparently did satisfy itself that Venezuela would apply American law. Thus, no Venezuelan policy would be infringed by the application by the court of United States law. Therefore, the DOSHA was found applicable because of the significant contacts and relationships under the doctrine of Lauritzen.°

The crash of this Venezuelan airliner was the basis of still another cause of action in Noel v. Linea Aeropostal Venezolana.°° Here suit was brought before a United States district court in New York for damages for conscious pain and suffering and for mental anguish of the surviving spouse and children. Such damages were not allowed under the DOHSA, but they were under Venezuelan law. The libel was based on section 764 of the DOHSA rather than section 761 which was the basis in the previous cases. Section 764 grants relief by the law of any foreign state arising from death on the high seas. Former cases which had applied American law were distinguished. The conclusion was reached that Lauritzen demanded the application of Venezuelan law. In the previous cases the suits were against American corporations, the acts of negligence charged had occurred within the United States, and the claims were presented under section 761 of the DOHSA, which in general creates an action for wrongful death on the high seas. Here the defendant and its aircraft were Venezuelan, some of the negligent acts occurred in Venezuela, the impact of these acts occurred on the high seas, and the claim was grounded on section 764 of the DOHSA.

A different decision was reached by the court of the southern district of New York in an earlier case involving still another proceeding based upon this Venezuelan airlines crash. In Fernández v. Linea Aeropostal Venezolana,°° libel was brought for the death of a stewardess on the ill-fated plane. Respondents claimed that section 761 of the DOHSA does not create a cause of action when death occurs on a foreign plane on the high seas; hence it

°° On the subject of renvoi see In Re Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Sur. Ct. 1950); Griswold, Renvoi Revisited, 51 Harv. L. Rev. 1165 (1938).

°°° See note 69 and accompanying text.


was not applicable. To the contrary, section 764 should be the sole basis of recovery upon a cause of action granted by foreign law. The court differed and indicated its belief that the remedies under the two sections were cumulative, not mutually exclusive. It said that the act maintained rights under foreign law and gave an additional right under section 761. It was of the opinion that to make section 764 exclusive when death occurred on a foreign aircraft would be a harsh rule if there were no wrongful-death action under the foreign law. This, it was believed, the Congress did not intend. Therefore, a cause of action under section 761 was deemed to be present.  

The court then felt compelled to deal with the Lauritzen principle and reached the conclusion that Lauritzen would not have significance as to section 761 of the DOHSA, for in that case the court had before it the application of the Jones Act, which was considered substantive. Section 761 of the DOHSA, it said, was procedural in character and therefore available in all cases as the rule of the forum. Such reasoning would accord with conflict of laws principles that matters of procedure are governed by the law of the forum. The weight of authority, however, holds wrongful-death statutes to be substantive, as creating new rights.  

On this ground the court seems to be in error.

With regard to the contention that a cause of action was afforded by Venezuelan law, the court said that the Venezuelan law was not pleaded in conjunction with the cause of action based on section 761 and that any further cause of action grounded on Venezuelan law could not be presented for Venezuelan law had not been pleaded with sufficient certainty. As a result uncertainty prevailed as to whether a cause of action under Venezuelan law could be said to exist.

*Bergeron v. Koninklijke Luchtvaart Maatschappij* dealt with actions for the deaths of United States citizens which had occurred on an aircraft of Netherlands' registry when it crashed into the Atlantic Ocean. The principal issue here, as in the previous case,  

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79 156 F. Supp. at 95-98.
was the availability of an action under section 761 when a foreign flag aircraft which might be governed by section 764 was involved. The libellant had pleaded section 761 as grounds for relief. She also claimed a cause of action under Dutch law pursuant to section 764 of the DOHSA. A cause of action did exist under Dutch law. The court adopted the approach of Noel v. Airponents, that wrongful death was regarded as substantive and the Lauritzen factors are applied. Therefore, section 761 is not limited to suits against American aircraft. It is also available in suits against foreign aircraft upon a finding of dominant and germane contacts. The court stated that Congress did not intend there should be no recovery for American citizens dying on the high seas, just because their deaths had occurred on a foreign aircraft. Thus section 761 should be resorted to when no recovery is available under foreign law, but when a basis for recovery under foreign law is present and sufficiently pleaded, there is no reason not to resort to section 764 which calls for application of foreign law unless an examination of all contacts indicates a more significant relationship to American law. The application of sections 761 and 764 is on the basis of the contacts and their importance as set out in Lauritzen. The court concluded that concurrent causes of action could not be maintained and dismissed claims based on section 761. Dutch law was applied under section 764 because the contacts of the Netherlands so demanded.

It should be noted that in following the Lauritzen v. Larsen philosophy and the system of contacts advanced by that case, these decisions, as Lauritzen itself, are a far cry from interest analysis ideas developed over recent years by non-admiralty conflict of laws cases and by jurists of the United States. The new theories which have had widespread acceptance were a revolt against the old vested rights theory whereby, in a situation with a foreign fact element, each case was decided according to the law of the state or nation having territorial jurisdiction because the case could be controlled only by the law of such state. Only the state of injury could create the right in a tort situation, in a land title case, the law of the situs of the property, and in a problem having to do with personal status, the law of the domicile.

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In breaking away from this theory the courts began to weigh the contacts when two or more states were connected with the transaction, seeking to apply the law of the place having the most dominant contacts. This often ended up in a counting of contacts in order to reach a decision and an application of the law of the state having the most quantitative contacts. This again resulted in a mechanical decision. What was really wanted was not such a mere counting of contacts, but a weighing and balancing of interests in order to see if a state's policy or purpose would be served by the application of a contact state's law to the issue or issues at hand. If not, that law was not to be applied and the law of the state would govern which did have an interest in the application of its laws. If two or more states had an interest, then a weighing and balancing process had to ensue to discover the most significant interest or relationship.

In the cases discussed above we find very little interest analysis. Language of Justice Frankfurter in *Romero*, however, does imply something more than a mere totting up of contacts. He stated: "The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations." Herein is suggested policy interests of two or more nations which should be taken into account before the application of this or that particular law.

In the DOHSA cases discussed above there appears to be little interest analysis on a qualitative basis. True the courts applying the *Lauritzen* contacts notion do look to the interests of the United States and the purposes of the DOHSA and the intentions of the Congress in enacting it, but they do not seem really concerned with making an analysis as to the interests of the foreign state or the policies behind the law of the foreign state. In *Noel v. Linea*

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Aeropostal Venezolana" where those seeking recovery were Americans, the court said Venezuelan law controlled because the airline was Venezuelan, acts of negligence occurred in Venezuela having impact on the high seas, and the parties sought to recover under section 764 of the DOHSA. No real determination as to whether Venezuela would have an interest in the application of its law to protect American citizens was made. Perhaps the policy existed, but the court did not see fit to explore the matter.

Today the most significant relationship doctrine is used primarily to denote the system adopted by the Restatement (Second) of Conflict of Laws. This is based upon a consideration of certain choice of law principles which should influence the courts in making the proper decision as to the governing law. These policy values which are influencing factors are: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law."

Although the new Restatement was published after these cases were decided, the choice of law principles were known previous to its publication. The courts looked into some of these policy factors in making decisions in the cases at hand, but no formal allusion to them or consideration of them was made by any of the judges. Properly, each choice of law factor should be examined to determine whether or not it has import with respect to the issue at hand. If not, it should be disregarded; if so, it will remain for consideration after making determination as to all other policy factors. In this way the law of the state having the most significant relationships vis-a-vis the choice of law factors can be determined and its law applied.

A recent decision by the Second Circuit, Benjamins v. British European Airways," may well have limited the force of the DOHSA insofar as that act is to be applied in its entirety to high seas crashes

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"Restatement (Second), note 83, supra.
occurring on international flights where the air carrier's registry is that of a nation adhering to the Warsaw Convention.\textsuperscript{88} This case reversed previous cases decided by the circuit which had held that the Warsaw Convention did not in and of itself create a cause of action despite the language of Article 17 of the Convention which provided:

The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18(1) provides further that the carrier shall be liable for damage for loss, destruction, or damage to baggage or goods if the damage is sustained during the air transportation.

The courts had consistently concluded that the Warsaw Convention only established conditions and standards for a cause of action which itself had to be created by domestic law. The Convention established no independent cause of action.\textsuperscript{89} Thus, for a death occurring on an international flight on or over the high seas, to which the Warsaw Convention would apply, the American courts have held that the cause of action was created by American law, the DOHSA, rather than by the Warsaw Convention.\textsuperscript{90} Once a cause of action was found to be created by a proper domestic law, then of course recovery thereon would be modified or controlled by the terms of the Convention to the extent that it was pertinent. Since the Warsaw Convention limits the liability of the carrier to a sum certain in the absence of contractual arrangements providing otherwise,\textsuperscript{91} such limitation of liability would be observed as to recovery under the DOHSA. Situations could arise, however, when the Convention might not be thought to govern. Even under the DOHSA or the general maritime law in personal injury cases


\textsuperscript{90} Warsaw Convention, \textit{supra} note 88.

\textsuperscript{91} \textit{Id.} at art. 22.
on the high seas, the principles of *Lauritzen* might well point to law other than that of the United States as controlling. Presumably, adherents to the Warsaw Convention would possess a law creating a cause of action, but what if all did not? Even if a cause of action were created, it could not be said with certainty that a limit of recovery lower than that provided by the Convention would not prevail if contained in the very law creating the cause of action. In any event, the *Benjamins* case, if followed, will solve the problem by recognizing that the need for uniformity in international air law demanded by the Warsaw Convention can best be met by the recognition of its terms as a universal source of a right of action. Consequently American courts should now view the Warsaw Convention as the creator of the cause of action in cases within its scope, rather than, in high seas situations, the DOHSA or the general maritime law.

Torts occurring within the territorial waters of a nation as contrasted with maritime torts occurring in and over the high seas, were subjected to different rules according to earlier decisions. In general, liability for a tort committed within the territorial waters of a state or nation was said to be governed by the laws of that state or nation. An exception was made, however, as to those torts which were concerned with or which affected the internal management or discipline of the vessel. Although occurring on a ship within the territorial waters the rule viewed the proper law as that of the nations whose flag the vessel flew. Today the choice of law principles in these instances would presumably follow the significant contacts or relationship theory as set forth in *Lauritzen v. Larsen*. In a proper situation a court, after weighing competing interests of two or more nations involved, would decide that the

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93 This argument would be difficult to make under the DOHSA, for section 764 speaks of the application of foreign law when a cause of action is given by that law. Thus, if no cause of action existed, the wrongful-death cause of action created by the DOHSA would ostensibly apply. Even here there could presumably be cases where the United States and its law had absolutely no interest in the parties or the issues. In such an instance it might be contended that no part of United States law should govern, and the case should be governed by a proper foreign law which may or may not provide a cause of action.


95 *Restatement, supra* note 65 at §§ 404-405.
law of the nation having the most significant interest should be applied. Executive Jet solves many problems with respect to most maritime torts arising from crashes of American aircraft in American territorial waters. Such torts would usually not be viewed as falling within the admiralty jurisdiction or law. Liability would be based on state law. Admiralty and maritime law including maritime conflict of laws could possibly become of importance and applicable if there existed not only a maritime locality, but also some other maritime connection, e.g., following the dicta in Executive Jet, a transoceanic flight which ended in a crash in the navigable waters of the United States. There appear to be no cases involving such facts.

There is also a dearth of aviation tort cases when the tort occurred within the territorial waters of another nation. Hammill v. Olympic Airways, S.A.96 is one such case. In that case a Greek airliner crashed in the territorial waters of Greece. A wrongful-death action was brought by the administrator of the estate of an American passenger who was killed in the crash. The court found maritime jurisdiction and applied the general maritime law which created a federal cause of action for wrongful death. The court did not find it necessary to determine whether the DOHSA applied, inasmuch as the court believed that the results would be practically the same under the DOHSA or the general maritime principle of wrongful death.

It has been suggested that the DOHSA may be considered applicable to deaths within a foreign nation’s territorial waters, for it is thought that the Congress intended to fix the one marine league limitation as a marine league from American shores. Waters beyond a marine league from American shores would be considered to be high seas even though within foreign territorial waters.97 If this be true, then the DOHSA should have been applied, particularly in view of the later decision of the United States Supreme Court to the effect that the DOSHA, when applicable,98 was intended to preclude the availability of recovery under the general maritime law. If the DOHSA had been applied, different results

could well have occurred, for as we have seen, section 764 of the DOHSA requires, in some situations, the applicability of the law of a foreign state when a right of action is granted by that state. Even under general maritime law principles, Greek law should have been given some consideration in light of *Lauritzen* and its progeny. The defendant contended that Greek law should control so as to oust the District of Columbia court from jurisdiction. Greece, unlike the United States, has adopted the Warsaw Convention even as to claims arising from Greek domestic flights. Under that Convention the United States is not one of the requisite four places for purposes of suit: the domicile of the carrier; the principal place of business of the carrier; the place where the contract had been made; or the place of destination." Moreover, the District of Columbia court was not sitting within the territory of a contracting party.

Over and above the jurisdictional question, the defendant urged that plaintiff should plead and prove Greek law as a basis for the cause of action. Since plaintiff had failed to do so, he had not stated a claim. These contentions were ignored by the court both as to the DOHSA and the general maritime law. The case is an illustration of a general tendency of American courts in admiralty cases to consider American law as controlling, i.e., the law of the forum is applied." Under *Lauritzen*, American admiralty should proceed on some weighing of competing interests of states when there is a conflict between American and foreign law. In *Lauritzen* it may well have been that Greece and its law and policy had a very vital interest in this transaction and at least one of the parties, the air carrier. Under these circumstances Greece may well have had the predominant interest. To resort to the American law without a consideration of foreign interest seems to do violence to the notion that American courts should accord respect for the interests of foreign nations in the interest of maritime commerce for this is a legitimate concern of the international community.

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