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OFFSHORE AVIATION CLAIMS

VANCE E. ELLEFSON*

Offshore operations have created a significant impact on the aviation industry. It is not unusual to have in excess of 1000 aircraft servicing the oil industry in the Gulf of Mexico alone. Nor is it unusual for a major operator to log in over 10,000 hours per month in one type of aircraft. Most of the aircraft providing offshore service are helicopters, but many fixed wing aircraft are also used to service both the oil and fishing industries. The operators providing such service are professionals, whose ability to provide maintenance and repair services rival that available from the manufacturers.

The loss of an aircraft offshore may lead to products liability claims against the aircraft, engine and avionics manufacturers as well as additional claims against the operator. Aircraft and engine service and repair facilities may also be brought in as parties to such suits. Since such losses occur offshore, the suits are usually governed by admiralty and maritime law, even though the manufacture and service of the aircraft may have occurred onshore. Those who deal with and assess the risks involved must therefore have some knowledge of how such claims will be dealt with in a court of law. In addition to ordinary liabilities, the contractual relationships

* J.D. (Loyola-New Orleans); Member of the firm of Lugenbuhl, Larzelere & Ellefson (A Law Corporation), New Orleans, La.; Admitted to practice in Louisiana; Member: Louisiana Bar Association; Maritime Law Association; Member Aviation Sections of Tort, Insurance Practice and Litigation Sections of American Bar Association; International Insurance Section of the International Law and Practice Section of American Bar Association; Member Tort Insurance Practice Section Louisiana Bar Association; Defense Research Institute; New Orleans Bar Association; and New Orleans Association of Defense Counsel.
between the parties may require that a company with little or no actual connection with the injury undertake to indemnify an actual tortfeasor. Parties involved must be aware of their legal and contractual duties to be able to properly assess their liability.

This discussion is concerned primarily with aviation claims arising out of offshore mineral exploration operations. Many of the comments, however, also apply to other claims arising in relation to operations over navigable waters. An attempt has been made to outline the general problem areas with particular reference to the effect of admiralty and maritime law on litigation. Because of the nature of the subject matter, much of the discussion is employee rather than passenger oriented and provides only a starting point in answering specific questions.

I. PRELIMINARY CONSIDERATIONS

The crash of an aircraft on navigable water requires an analysis of the basic facts of the flight: origination; destination; and identity of the operation. As established by Executive Jet, the crash of an aircraft on navigable water does not necessarily mean that admiralty law will apply. If admiralty law is applicable, however, its effect may be tempered by statutes such as the Savings to Suitors Clause, diversity of citi-

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1 This paper does not address the problems arising out of the "international transportation" of fare paying passengers over navigable water. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1979, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1976). Nor does it address the areas of Conflicts of Laws and insurance coverage.

2 Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972)(holding that federal admiralty jurisdiction extends to aviation tort claims cases involving a significant relationship to traditional maritime activity and not necessarily to such cases that merely occur over navigable water).

3 28 U.S.C. § 1333(1) (1976). That section provides that Federal district courts have exclusive original jurisdiction over "any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Id. See infra notes 11-17 and accompanying text.
zenship,4 federal question,5 the Jones Act,6 the Death on the High Seas Act,7 the Outer Continental Shelf Lands Act,8 or the Longshoremen and Harborworkers’ Compensation Act,9 as well as state law.10

In analyzing a claim arising out of the loss of an aircraft on navigable water, a determination must be made as to the availability of a jury trial, whether there is concurrent jurisdiction in state or federal court, the nature and extent of the application of strict products liability or premises doctrines and other similar questions. Additional questions, with particular reference to offshore oil exploration, such as contractual relationships and the existence of independent contractors, must also be answered. Answers to these latter questions may be determined, in part, by reference to cases arising under the maritime law outside of the aviation context.

II. PRIMARY JURISDICTION PROBLEMS

There are a number of ways to approach problems arising in relation to offshore aviation litigation. One point of embar-

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4 28 U.S.C. § 1332(a)(1) (1976). That section provides that Federal “district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 ... and is between citizens of different states ....” Id.
5 28 U.S.C. § 1331 (Supp. IV 1980). That section provides that Federal “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Id.
7 46 U.S.C. § 761 (1976), which allows a decedent’s personal representative to recover for death “[c]aused by wrongful act, neglect, or default occurring on the high seas.” Id.
8 43 U.S.C. §§ 1331-1343 (1976 & Supp. IV 1980). Section 1333(a)(2)(A) provides that “[t]o the extent they are applicable and not inconsistent with other federal laws. ... the civil and criminal laws of each state ... are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf ....” Id. § 1333(a)(2)(A) (Supp. IV 1980).
9 33 U.S.C. §§ 901-950 (1976). Section 905(a) provides that compensation shall be the exclusive liability of an employer to an employee who suffers disability or death from an injury occurring on navigable waters of the United States. Id. § 905(a).
10 See Rodrigue v. Aetna Casualty & Sur. Co., 395 U.S. 352 (1960)(holding that under the Outer Continental Shelf Lands Act the remedy of the families of two men killed while working on an offshore drilling rig was governed by Louisiana law); see supra note 8.
kation, for both plaintiff and defendant, is at the courthouse door. The primary questions being which door or doors are open to the litigants, and whether the parties have access to a federal or state court, or both. The answers are also affected by matters addressed at a later point but, using these questions as a starting point, a number of considerations must be analyzed.

Federal district courts have original jurisdiction, exclusive of state courts, under 28 U.S.C. § 1333, in any civil case of admiralty or maritime jurisdiction. . . ." The text of § 1333, however, contains the so-called “saving to suitors” clause which provides that “[t]he district courts shall have original jurisdiction, exclusive of the courts of the States’ of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." What is “saved” to suitors? Admiralty commentators have summarized the application of the clause as follows:

Where the suit is in personam, it may be brought either in Federal Court under the admiralty jurisdiction (which must in that case either be specially invoked by the plaintiff or visibly be the only ground of federal jurisdiction) or, under the saving clause, in an appropriate non-maritime court, by ordinary civil action. Where the suit is in rem, only the Federal Court acting under its admiralty power, has jurisdiction. . . .

One very important caution must be added at this point. The allocation of jurisdiction just sketched is the one that has been derived from construction of the section of the Judiciary Act dealing generally with admiralty cases; it is a correct picture only for cases not otherwise provided for by the statute."

The following may clarify the above quotation. In personam claims, even those arising out of what appears to be a purely maritime context, may be brought at the suitor’s election in a “common law” court. That is, suit may be brought by ordinary civil action in state court. Such a suit may also be brought in federal court without reference to admiralty, if the

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12 Id. § 1333(1) (emphasis added).
requisite federal jurisdiction is established by way of an additional separate basis such as federal question, diversity of citizenship, or the Jones Act. A suitor may not be able to claim federal jurisdiction and a trial by jury absent one of these bases on the theory that a maritime claim "arises under" the laws of the United States.

Approached from another point of view, where the cause of action being asserted is not based on a statute vesting exclusive jurisdiction in federal courts, the claim may normally be asserted in either state or federal court. For example, the Outer Continental Shelf Lands Act, on its face, seems to suggest exclusive federal jurisdiction. But the United States Supreme Court has interpreted the statute as granting a cause of action enforceable in either state or federal court. There is a substantial difference of opinion, however, with regard to interpretation of jurisdiction under the Death on the High Seas Act. Some courts enforce exclusive federal jurisdiction, while others view the statute as granting a right of action in either state or federal court.

15 Id. § 1332.
The defendant must determine if removal from state to federal court is possible and whether removal is desirable. Aside from purely subjective considerations, the view is often expressed that the federal “admiralty” courts are more familiar with and experienced in the application of admiralty law than are the state “common law” courts. The defendant’s ability to remove the case to a federal court, however, must be predicated on a separate basis in addition to admiralty jurisdiction. That is, in order to remove, a defendant must have an additional basis for federal jurisdiction such as diversity and amount in controversy or federal question. The defendant must also bear in mind that some statutes, such as the Jones Act, preclude removal of a claim filed in state court.

III. APPLICABLE LAWS

Once the appropriate jurisdiction is determined, the question arises as to the body of law to be applied. Barring a specific statutory directive to the contrary, it has been held that the need for uniform application of federal maritime law precludes the applications of state law. Whether tried in state or federal court, therefore, the case will be subject to and

N.E.2d 820, 10 N.Y.2d 258, 219 N.Y.S.2d 245 (1961) (holding that the Death on the High Seas Act allows recourse to procedure under state act to enforce substantive rights provided by the federal courts).


See supra note 15.


guided by the substantive admiralty law. Without delving into considerations of procedure versus substance, it can be assumed that such law will apply to questions regarding the causes of action available and the amount of damages that are recoverable.

IV. PLEADING AND PARTIES

Actions in state courts will generally be governed by state procedural rules. Aviation related claims involving an individual or corporation who is not a United States citizen, however, may be asserted in a federal admiralty proceeding rather than in state court when the litigants might otherwise be relegated to seeking their remedy in another country. But, the Supreme Court's recent decision in Piper Aircraft Co. v. Reyno, clearly appears to limit such access of foreign litigants to United States' courts. There is case law, however, allowing foreign litigants to maintain federal admiralty proceedings wherever the defendant can be found, subject only to the venue requirements of the United States Code.

Assuming that a suit is filed in federal court, there are a number of procedural points which the parties must bear in mind. Rule 9(h) of the Federal Rules of Civil Procedure states:

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A pleading . . . setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claims for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. "If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not."8

The reference to Rules 14(c) and 38(e) is of particular importance. Under the Third Party Practice provisions of Rule 14,83 a third-party defendant may be added by way of claims over for indemnity, contribution or similar remedies. In admiralty and maritime claims, Rule 14(c) provides for the tender of the third-party defendant to the plaintiff as a direct defendant.84 The suit then proceeds as if the claim had been made directly against the third-party defendant by the plaintiff. Judgment may be entered in favor of the plaintiff directly against the third-party defendant. Thus, an aircraft manufacturer who has been made the subject of a Third Party Demand may find itself tendered as a direct defendant to the plaintiff and subject to judgment on the main demand.

Rule 38(a) preserves the right to trial by jury in civil actions in federal court. However, Rule 38(e) states that "[t]hese rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."85 The federal courts treat the identification of a claim as "an admiralty and maritime claim" as an election by the plaintiff to proceed on the "admiralty" side of the court rather than on the "law" side. In other words, the courts view the plaintiff as having elected to try his claim to the judge rather than to a jury.86 Where the plaintiff asserts a claim that

82 Fed. R. Civ. P. 9(h) (emphasis added).
83 Id. 14.
84 Id. 14(c).
85 Id. 38(e).
86 See Romero v. Bethlehem Steel Corp., 515 F.2d 1249, 1252 (5th Cir. 1975) (observing that "the unification of the admiralty and civil rules . . . work[ed] no change in the general rule that admiralty claims are to be tried without a jury.").
can be heard in a federal court only under the court's admiralty and maritime jurisdiction and demands a jury, the defendant may strike the jury and try the case to the judge.\(^{37}\)

Admiralty courts have historically exhibited a desire to apportion liability and to attribute fault to those who actually caused the damage. The doctrine of comparative negligence was long applied in admiralty and maritime claims while the "common law" courts still clung to the contributory negligence "bar" to recovery. Theories of apportionment have progressed from so-called liability-shifting indemnity theories to direct apportionment of liability on a percentage basis.

Where two or more defendants were subject to judgment, the courts initially developed a system to shift liability to the defendant "actively" at fault.\(^{38}\) The difficulty arose, however, in defining "active" fault. In *Loose v. Offshore Navigation, Inc.*,\(^{39}\) the Fifth Circuit directed its attention to that stumbling block and adopted a true comparative fault system by eliminating the so-called "active-passive" indemnity theory.\(^{40}\) The court made it clear that, in both personal injury and property damage cases, a "precise determination" of the fault of each party would be required of the trier-of-fact.\(^{41}\) Requiring the case to the District Court, the Fifth Circuit stated that "we direct the trial judge on remand to eliminate any instructions or interrogatories relating to active and passive negligence, and instead instruct the jury to assess the relative degree of responsibility of each party for the plaintiff's

\(^{37}\) See *Powell v. Offshore Nav., Inc.*, 644 F.2d 1063 (5th Cir. 1981); *Harrison v. Flota Mercante Grancolumbia, S.A.*, 577 F.2d 968, 986 (5th Cir. 1978); *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249, 1252 (5th Cir. 1975).

\(^{38}\) *Cotton v. Turo "R" Drilling Co.*, 508 F.2d 669, 671 (5th Cir. 1975) (stating that a non-negligent or passively negligent shipowner should not be assessed damages for losses caused by an actively negligent party); *Kelloch v. S. & H. Subwater Salvage, Inc.*, 473 F.2d 767, 769 (5th Cir. 1973) (stating that a passively negligent party is entitled to total indemnity from the actively negligent party). *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 181 (5th Cir. 1969) (holding that a "right of indemnity exists between parties, one of whom is guilty of active or affirmative negligence, while the other's fault is only technical or passive").

\(^{39}\) *670 F.2d 493* (5th Cir. 1982).

\(^{40}\) *Id. at 501-02.*

\(^{41}\) *Id. at 501.*
injuries."

The law in the Fifth Circuit now requires that verdicts in maritime claims, whether based upon personal injury, products liability, or property damage, apportion fault among the parties on a percentage basis. This concept has been applied to include apportionment of fault between the parties at trial as well as those who have settled their claims prior to trial. Where the plaintiff is covered by the Longshoremen and Harborworkers' Act, however, the employer's fault may not be considered at all to offset the plaintiff's recovery against third party tortfeasors.

As is obvious from the above discussion, aviation claims arising out of operations over navigable water require a cautious and reasoned approach by both plaintiff and defendant. The choice of forum, the choice of parties, and the substantive and procedural remedies available to the litigants are subject to a number of variables. The plaintiff's desire to fill all of the chairs at the defendant's table may result in adding non-diverse parties whose presence prevents the plaintiff from trying his federal court claim to a jury. The defendant's desire to remove a case from state to federal court, where the plaintiff has not requested trial by jury, however, may provide the

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43 Id. at 502.

44 See Bottazzi v. Petroleum Helicopters, Inc., 664 F.2d 49, 51 (5th Cir. 1981) (stating that equal division of damages between tort-feasors is appropriate where separate acts of the tort-feasors produce a unitary injury and their individual contributions of damage are not ascertainable); Harrison v. Glota Mercante Grancolombia, S.A., 577 F.2d 968, 981-82 (5th Cir. 1978) (holding that if the amount of contributory negligence of each defendant is not individually ascertainable, liability must be imposed against both defendants).

45 See United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (holding that where two or more parties are contributorily at fault in causing property damage in a maritime collision, liability must be allocated between the parties in proportion to their degree of fault); Gator Marine Serv. Towing, Inc. v. J. Ray McDermott & Co., 651 F.2d 1096, 1099 (5th Cir. 1981) (stating that concurrently negligent parties are liable for their respective portions of the damages in cases involving maritime losses).

46 See Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1248-49 (5th Cir. 1979) (stating that parties in a maritime collision case who "are both partly responsible for an accident" shall each be liable for their proportionate degree of fault).


plaintiff the right to demand a trial by jury.

V. THE EFFECT OF FEDERAL AND STATE LAW ON AVIATION CLAIMS

Claims arising out of the loss of an aircraft on navigable water, whether for property damage, personal injury or death, are affected by statute, both as to the remedies available and the damages recoverable by the claimant. The following sections will explore the effect of state law and various federal statutes on these issues.

A. The Effect of State Law on Claims Under the General Maritime Law

Courts have continually expressed the view that the need for uniformity requires that the body of federal statutes and case law which constitute the federal maritime law, preempt the application of state law.8 On occasion, however, admiralty courts have adopted state law as part of the substantive admiralty law. The two most notable instances are the adoption of a death remedy under the general maritime law and the trend of admiralty courts to apply the doctrine of strict products liability contained in Section 402A of the Second Restatement of Torts.9

The legal history of the general maritime death remedy has been reiterated in numerous cases and treatises. It suffices to say that it became apparent that there existed a remedy for those who died beyond one marine league50 from the shore of any state under the Death on the High Seas Act,51 and for the death of the master or a member of the crew of a vessel under the Jones Act.52 There was, however, no admiralty remedy for those who were precluded from the Jones Act coverage who died as the result of injuries sustained in the area between the shore of a state and the one marine league line drawn by the

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9 Restatement (Second) of Torts § 402A (1965).
50 A marine league is three nautical miles.
52 Id. § 688.
Death on the High Seas Act. The admiralty courts initially attempted to fill this gap in the law by applying the wrongful death statute of the adjacent state. These attempts often resulted in a complicated analysis turning on the determination of whether state death statutes contemplated coverage of deaths occurring on navigable waters. Absent such a remedy under state law, there was no recovery on the death action. In Moragne v. States Marine Lines, Inc., the Supreme Court analyzed the hiatus in the law and determined that the need to provide a uniform federal maritime death remedy and the fact that a majority of states provided such a remedy for land-based injuries, required the recognition of an action for wrongful death under general maritime law. In Sea-Land Services, Inc. v. Gaudet, the elements of the remedy were defined by the Supreme Court which include non-pecuniary damages for "loss of society" as well as pecuniary damages.

Several federal courts have also determined that the doctrine of strict products liability should apply to maritime law, basing their determination on the acceptance of the doctrine by a large number of state courts. Some of the cases adopting § 402A strict liability have arisen in relation to aviation claims. Strict products liability, however, is not yet uni-

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83 See Marcum v. United States, 452 F.2d 36 (5th Cir. 1971) (stating that liability for wrongful death in state territorial waters is measured under that state's substantive laws); Curry v. Fred Olsen Line, 367 F.2d 921 (9th Cir. 1966), cert. denied, 386 U.S. 971 (1967) (stating that federal courts must apply state law in diversity actions for wrongful death by maritime tort); Emerson v. Holloway Concrete Prod. Co., 282 F.2d 271 (5th Cir. 1960), cert. denied, 364 U.S. 941 (1961) (stating that a state's wrongful death statute must be applied where death occurs on the navigable waters of that state).

84 See supra note 53.
86 Id. at 400-04.
88 Id. at 583-91.
89 See Pan-Alaska v. Marine Constr. & Design Co., 565 F.2d 1129, 1134-35 (9th Cir. 1977) (holding that "theories of strict liability in tort now so prevalently applied on land can be applied to suits in admiralty"); Lindsay v. McDonnell-Douglas Aircraft Corp., 460 F.2d 631, 635 (8th Cir. 1972) (stating that federal maritime law encompasses the doctrine of strict liability in tort).
90 RESTATEMENT (SECOND) OF TORTS § 402A (1965).
91 See Lindsay v. McDonnell-Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972).
formly accepted by all admiralty courts. These examples are the exceptions rather than the rule. Admiralty courts will not apply state law merely because of a hiatus, real or imagined, in the federal maritime law. Admiralty courts will rely on their own rules and remedies and in most cases, will approach the suggestion of the creation of new remedies or causes of action with caution.

B. Death on the High Seas Act

The Death on the High Seas Act (DOHSA) creates a cause of action in admiralty for deaths arising out of injuries occurring on navigable water beyond one marine league from the shore of any state. The fact that the negligence which is alleged to have caused the death may have occurred onshore or in the air, rather than on the water, does not preclude the application of the statute. In Mobil Oil Corp. v. Higginbotham, the Supreme Court applied the DOHSA to passenger death claims arising out of the crash of a helicopter on the high seas. The Court refused to sustain the award of non-pecuniary damages under the Moragne/Gaudet rationale. Rather, the Court held that the only damages recoverable by all claimants, regardless of the nature of the decedent’s employment, were the “pecuniary” damages specifically set out in the DOHSA.

The DOHSA has also been applied to deaths occurring on

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62 See Williams v. Brasea, Inc., 497 F.2d 67, 78 (5th Cir. 1974), cert. denied, 423 U.S. 906 (1975) (noting that the incorporation of products liability law into the general maritime law is an open issue).
63 Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972); Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1972) (stating that federal courts must carefully construe constitutional and statutory provisions dealing with federal court jurisdiction so as to avoid intruding on areas reserved for state law). The holding of Executive Jet implied that no maritime tort exists where an airplane crashes into a lake, even a Great Lake such as Lake Erie.
65 Id. § 761.
68 Id. at 624-26.
69 See supra text accompanying notes 46-48.
70 436 U.S. at 625.
navigable waters within the territorial jurisdiction of other
countries.\textsuperscript{71} Subject to jurisprudential limitations, the DOHSA
is applied broadly outside of the one-marine-league limit.\textsuperscript{72}
Unfortunately, despite the desire for uniform maritime reme-
dies, the DOHSA's specific territorial limitations and the Su-
preme Court's decision in \textit{Moragne} have created non-uniform
remedies. Claims arising out of deaths occurring as the result
of the crash of an aircraft up to three miles from the shore of
a state are governed by the general maritime law which allows
recovery of both pecuniary and non-pecuniary damages. But
those arising out of the crash of an aircraft beyond three miles
from the shore of a state are limited to the pecuniary damages
available under DOHSA.\textsuperscript{73}

\section*{C. Outer Continental Shelf Lands Act}

The Outer Continental Shelf Lands Act (Lands Act)\textsuperscript{74} ex-
pressly declares the policy of the United States to be that
"the subsoil and seabed of the Outer Continental Shelf apper-
tain to the United States and are subject to its jurisdiction,
control, and power of disposition."\textsuperscript{75} This declaration of policy
is construed to preserve the "character" of the waters above
the Outer Continental Shelf as high seas and to assure that
"the right to navigation and fishing therein shall not be af-
ected."\textsuperscript{76} In short, the Lands Act not intended to affect the
admiralty law as it applied to the navigable water above the
Continental Shelf itself, nor has it been so interpreted.\textsuperscript{77}

The territorial limit of the Outer Continental Shelf has
been determined by the Supreme Court through reference to

\begin{itemize}
  \item \textsuperscript{71} See Cormier v. Williams/Sedco/Horn Constr., 460 F. Supp. 1010 (E.D. La. 1978)
  (holding that DOHSA applied to wrongful deaths occurring on the high seas of any
  state).
  \item \textsuperscript{72} Id.
  \item \textsuperscript{73} See Mobil Oil, 436 U.S. at 622. \textit{Discussed supra} at text accompanying notes 67-

70.
  \item \textsuperscript{74} 43 U.S.C. §§ 1331-1343 (1976 & Supp. IV 1980).
  \item \textsuperscript{75} Id. § 1332(1) (Supp. IV 1980).
  \item \textsuperscript{76} Id. § 1332(2).
  \item \textsuperscript{77} See Guess v. Read, 290 F.2d 622, 625 (5th Cir. 1961), \textit{cert. denied}, 368 U.S. 957

(1962) (stating that the Lands Act was intended to govern questions of ownership and
jurisdiction of the minerals \textit{in and under} the Continental Shelf).
\end{itemize}
international treaties and the original territorial grants by European nations to their colonies prior to independence. As a result of litigation by various states before the Supreme Court, a general rule has emerged. Basically, in the Gulf of Mexico, the Outer Continental Shelf begins three nautical miles from the state shoreline. On the east and west coasts, however, the shelf begins three marine leagues⁷⁸ from the shores of the various states.⁷⁹

With regard to aviation claims, the most pertinent portion of the Lands Act is section 1333(b), which states:

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and the seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act . . . . For the purposes of the extension of the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act under this section —

1. the term “employee” does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
2. the term “employer” means an employer any of whose employees are employed in such operations; . . . .⁸⁰

The Lands Act generally extends all applicable civil and criminal laws of the United States to “all artificial islands”, and “all installations and other devices permanently or temporarily attached to the seabed . . . .”⁸¹ Section 1333(2)(A) provides that:

⁷⁸ Three marine leagues are equal to nine nautical miles.
⁸¹ Id. § 1333(a)(1) (1976).
To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations . . . now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

The effect of this section is to apply state law as a surrogate to federal law for the “fixed platforms” located on the Outer Continental Shelf.

The Lands Act has had its greatest effect in the area of personal injury and death claims. The effect of the Lands Act on aviation claims has been fairly well defined in a series of Fifth Circuit cases. That court has construed the statute broadly to apply to virtually all injuries occurring as a result of operations described within the Lands Act, such as exploring for, developing, removing, or transporting natural resources by pipeline, without regard to the physical situs of the injury.

The Lands Act applies the provisions of the Longshoremen and Harbor Worker's Compensation Act to persons working on the Outer Continental Shelf who are not covered by the Jones Act. Thus, a personal injury or death claim on behalf of a passenger in an aircraft owned or operated by his employer, which occurs “as a result of operations” on the Continental Shelf, may not be asserted against the employer because of the exclusive remedy provisions of the Longshoremen and Harbor Workers' Compensation Act. On the other hand,

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8 Id. § 1333(a)(2)(A).
8 See Stansbury v. Sikorski Aircraft, 681 F.2d 948, 950 (5th Cir. 1982) (stating that Section 1333(3)(b) applied to injuries within the Lands Act regardless of the physical situs of the injury); Nations v. Morris, 483 F.2d 577, 584 (5th Cir. 1973), cert. denied, 414 U.S. 1071 (1973) (stating that Congress purposely established the Lands Act without regard to physical situs of the injury).
if the aircraft is operated by a third party, the employee may maintain an action against the third-party aircraft operator.\textsuperscript{88}

In \textit{Ledoux v. Petroleum Helicopters, Inc.},\textsuperscript{89} the Fifth Circuit held that the crash of a helicopter being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures bears the type of significant relationship to traditional maritime activity necessary for admiralty jurisdiction.\textsuperscript{90} The main issue in \textit{Ledoux} was whether the exclusive remedy provisions of the Louisiana Workmen's Compensation Act barred a general maritime law claim by an employee hired in Louisiana and working for a Louisiana based employer.\textsuperscript{91} What is not apparent from the decision is that the \textit{Ledoux} aircraft crashed off the coast of Angola, Africa.\textsuperscript{92} Given the geographical location of the occurrence and the court's \textit{per curiam} statement that state law would not be applied to preclude an "admiralty" remedy,\textsuperscript{93} \textit{Ledoux} can be viewed only as a reaffirmance of long existing law.

In \textit{Kolb v. Texaco, Inc.},\textsuperscript{94} the heirs of a helicopter pilot filed suit against the operator of a fixed platform located on the Outer Continental Shelf.\textsuperscript{95} The pilot was killed when his main rotor blade struck a crane located on the platform and fell into the waters of the Gulf of Mexico.\textsuperscript{96} The suit was consolidated with the helicopter owner's claim against the platform operator for loss of the aircraft based on admiralty and diversity jurisdiction.\textsuperscript{97} The plaintiffs in the death case abandoned all claims except those under the DOHSA.\textsuperscript{98} The District Court dismissed the admiralty and DOHSA claims by way of summary judgment, holding that section 1333(a) of the Lands

\textsuperscript{88} Stansbury v. Sikorski Aircraft, 681 F.2d 948 (5th Cir. 1982).
\textsuperscript{89} 609 F.2d 824 (5th Cir. 1980).
\textsuperscript{90} \textit{Id.} at 824.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} 684 F.2d 1102 (5th Cir. 1982).
\textsuperscript{95} \textit{Id.} at 1105.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
Act applied to the exclusion of admiralty law. The Fifth Circuit reversed, holding that the death claim was covered by the DOHSA, and the property damage claim was cognizable under admiralty law. Admiralty jurisdiction over the property claim was sustained under the rationale of Ledoux. With regard to the death claim, the Fifth Circuit held "that admiralty jurisdiction over Kolb's claim against non-employer third parties is not ousted by Section 1333(a) of the [Lands Act]."

The Lands Act applies the law of the adjacent state to injuries occurring on fixed platforms as a surrogate for federal law in addition to existing federal law. Thus, statutes of adjacent states concerning statutes of limitation, strict products or premises liability, and, in general, tort law will be applied under the Lands Act. Where express federal law exists, however, that law is applied to platform claims to the exclusion of state law. As an example, 28 U.S.C. § 1961, which requires that interest on a judgment is to be awarded from the date of entry of judgment, applies to the exclusion of state laws with regard to the award of interest on judgments.

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90 Id.
91 Id. at 1111-12.
92 Id. at 1112.
93 Id.
96 See Olsen v. Shell Oil Co., 561 F.2d 1178 (5th Cir.), reh'g denied, 565 F.2d 163 (5th Cir. 1977), questions certified, 574 F.2d 194 (5th Cir. 1978), certified questions answered, 365 So. 2d 1285 (La. 1979), rev'd and aff'd, 595 F.2d 1099 (5th Cir. 1979), cert. denied, 444 U.S. 979 (1980) (holding that the OCSLA did not create a private cause of action in favor of plaintiffs against a platform owner for breach of a regulation of the Secretary of the Interior).
97 See Alford v. Pool Offshore Co., 661 F.2d 43, 45 (5th Cir. 1982) (holding that whether plaintiff's contributory negligence or assumption of the risk was sufficient to constitute a defense under Louisiana strict liability statute was a matter of fact precluding summary judgment for the defendant); Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334, 336 n.1 (5th Cir. 1980), cert. denied, 449 U.S. 528 (1981) (holding that evidence presented a jury question as to whether owner of rig could be held liable under Louisiana statute governing liability of owner of building for damage occasioned by its ruin).
98 Aymond v. Texaco, Inc., 554 F.2d 206, 211-12 (5th Cir. 1977) (holding that federal, not state, law controlled the date from which interest would be awarded on judg-
The question that has not yet been answered is that of the law applicable to helicopter accidents which occur solely on fixed platforms on the Outer Continental Shelf. In other words, what happens when there is no direct contact between the aircraft and navigable water? One argument, under the Ledoux/Kolb rationale, is that the helicopter's use in pursuit of traditional maritime activity requires that the claim be governed by maritime law. The opposing argument for the application of state law is buttressed by the language of the Lands Act itself. It is difficult to predict the ultimate resolution of that question, but the Fifth Circuit's reference in Kolb to the Supreme Court's statements in Rodrigue about accidents occurring "on" fixed platforms may be one key.

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108 See Kolb v. Texaco, Inc., 684 F.2d 1102 (5th Cir. 1982). The court therein held:

As to the essential maritime nexus, we recently held in Ledoux v. Petroleum Helicopters, Inc., 609 F.2d 824, 824 [sic] (5th Cir. 1980) (per curiam) that the "crash of [a] helicopter while it [is] being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity which is necessary to invoke admiralty jurisdiction." Therefore, both the locality and maritime nexus requirements being met, we hold that the Petroleum Helicopters claim, like the Kolb death claim, may be brought into admiralty.

Id. at 1102.

109 Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1976 & Supp. IV 1980). "OCSLA makes the law of the adjacent state, to the extent such law is not inconsistent with federal law, applicable as 'surrogate' federal law to the subsoil and seabed of the Outer Continental Shelf and to the platforms erected thereon." Kolb v. Texaco, Inc., 684 F.2d 1102, 1109 (5th Cir. 1982).

110 Kolb v. Texaco, Inc., 684 F.2d 1102 (5th Cir. 1982). Cf. cases cited id. at 1110, n.29, with id. at 1110-11; and In Re Dearborn Marine Service, Inc., 499 F.2d 263, 273 (5th Cir. 1974), cert. denied sub nom. Monk v. Chambers, 423 U.S. 886 (1975) (holding that land law of Texas applied to wrongful death action against oil platform owner but admiralty jurisdiction applied to claim against nearby vessel); and Kimble v. Noble Drilling Corp., 416 F.2d 847, 850 (5th Cir. 1969), cert. denied, 397 U.S. 918 (1970) (holding that the question whether an employee injured on stationary platforms at sea was entitled to recover from his employer under general maritime law depended not on the location of the platforms, but on his assignment to and responsibilities on vessels which supported the platforms).
D. Jones Act

The Jones Act\(^{\text{111}}\) generally extends the provisions of the Federal Employer's Liability Act (FELA)\(^{\text{112}}\) to masters and members of the crew of vessels. The Jones Act is an employee's remedy against his employer, provided that the employer/employee relationship exists.\(^{\text{113}}\) The employee must ordinarily be assigned to a vessel, or a specifically identifiable fleet of vessels, and his work must contribute to the navigation or mission of the vessel.\(^{\text{114}}\) In terms of application of the statute, a determination must be made as to whether the employee was a seaman assigned to a vessel or fleet of vessels. This determination eliminates employees assigned to fixed structures\(^{\text{115}}\) and employees who are not considered to be seamen permanently assigned to a vessel.\(^{\text{116}}\)

One obvious question is: What is a "vessel"? With regard to offshore oil exploration, coverage of the Jones Act is extended not only to what the layman might ordinarily consider to be "vessels", but also to those structures which, even though they may at various times be affixed to the seabed, are capable of moving under their power or of being moved from one loca-


\(^{\text{113}}\) See Cosmopolitan Shipping Co. v. McAlister, 337 U.S. 783 (1949) (holding that a general agent of the United States is not an employer under the Jones Act); Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975) (holding that labor contractor who hired and paid seaman was seaman's Jones Act employer); Dugas v. Pelican Const. Co., 481 F.2d 773 (5th Cir.), cert. denied, 414 U.S. 1093 (1973) (holding that a roustabout employed by an on-shore construction company was not entitled to Jones Act protection when injured on a drilling barge while on temporary assignment).

\(^{\text{114}}\) See Offshore Co. v. Robinson, 266 F.2d 769, 779 (5th Cir. 1959) (holding that the question of whether a roughneck working temporarily on a drilling platform being towed to sea is a seaman under the Jones Act is a question for the jury).


\(^{\text{116}}\) See Stokes v. B. T. Oilfield Serv. Inc., 617 F.2d 1205 (5th Cir. 1980) (holding that a roustabout not permanently assigned to a barge was not a seaman for purposes of the Jones Act and could not recover under the Jones Act for injuries received on the barge); Fazio v. Lykes Bros. S.S. Co., 567 F.2d 301 (5th Cir. 1978) (holding that a shoregang employee injured aboard a vessel did not have a permanent connection with any vessel and was therefore not entitled to recover under the Jones Act).
tion to another by flotation on navigable water. Thus, so called movable "rigs", or barges, and many other structures which might not ordinarily be considered such, are in fact "vessels" for the purposes of the Jones Act.

The Jones Act effects aviation claims because occasionally, its coverage extends beyond the limits of navigable waters and the confines of "vessels". The Act is broadly construed. The seaman's Jones Act claim against his employer may arise in the context of "negligent" failure to provide "safe" transportation. Mobil Oil Corp. v. Higginbotham has established that the DOHSA will prevail with regard to crashes on the High Seas. The rationale applied by the Supreme Court in Higginbotham and Moragne permits maintenance of a claim under the Jones Act against a seaman's employer with regard to accidents occurring between the shoreline and the one marine league limit of the DOHSA. The ultimate effect of Jones Act claims by aircraft passengers against their employers is to provide a method of obtaining a jury trial in cases which might otherwise arise solely in admiralty and not be tried to a jury.

With minor exceptions, aircraft have not been considered to be "vessels" by the courts. Attempts to assert claims under

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\(^{117}\) See Davis v. Hill Eng'g, Inc., 549 F.2d 314 (5th Cir. 1977) (derrick barge); Hicks v. ODECO, 512 F.2d 817 (5th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (submersible petroleum storage tank); Neill v. Diamond M Drilling Co., 426 F.2d 487 (5th Cir. 1970) (submersible drill barge).

\(^{118}\) See, e.g., O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943) (holding that a deckhand injured while temporarily on shore in the service of his vessel was entitled to recover under the Jones Act); Vincent v. Harvey Well Serv., 441 F.2d 146 (5th Cir. 1971) (holding that a seaman injured while being transported home in an automobile furnished by his employer and driven by a paid employee were entitled to recovery under the Jones Act); Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945) (holding that seaman assaulted by fellow seaman while working on shore was entitled to recover under the Jones Act); Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945) (holding that a seaman injured while attempting to board his vessel after personal leave was entitled to recover under the Jones Act).


\(^{120}\) Id. at 625-26.

\(^{121}\) See supra text accompanying notes 67-70.


\(^{123}\) See supra text accompanying notes 30-37.
the Jones Act on behalf of aircraft crewmembers have, with
one known exception, been dismissed on the basis that air-
craft are not vessels and the Jones Act does not apply to air-
craft crewmembers. In Barger v. Petroleum Helicopters,
Inc., the United States District Court for the Southern Dis-
trict of Texas determined as a question of "fact" that a heli-
copter equipped with floats was a "vessel" within the meaning
of the Jones Act. The court made this determination with
consideration given to the fact that the helicopter was subject
to admiralty jurisdiction, and that it was capable of landing
and taking off from navigable waters.

In Smith v. Pan Air Corp., however, the Fifth Circuit
impliedly rejected the Barger approach. In Smith, a seaplane
left New Orleans Lakefront Airport, flew to a landlocked facil-
ity near the mouth of the Mississippi River, and landed in a
canal near that facility. After takeoff from the canal, the
aircraft flew back over the landing area, struck a radio tower
and fell to the earth at the base of the tower. A suit was
filed for the death of the pilot against the tower owner, alleg-
ing admiralty and diversity jurisdiction, and against the pi-
lot's employer under the Jones Act. The district court dis-
mised the admiralty and Jones Act claims by summary judg-
ment. Affirming the lower court, the Fifth Circuit
agreed that admiralty jurisdiction was lacking since the air-
craft crashed on land, rather than on navigable water, and the
claim lacked the "situs" required by Executive Jet. With
regard to the Jones Act claim, the court recognized that, while
claims under the Jones Act might at times extend land-

195 Id. at 1208.
196 Id. at 1206-08.
197 Id. at 1207.
198 684 F.2d 1102 (5th Cir. 1982). Consolidated with Kolb v. Texaco, Inc. See supra
text accompanying notes 94-102.
199 684 F.2d at 1104.
200 Id.
201 Id. at 1105.
202 Id.
203 Id. at 1108.
ward, the district court properly dismissed the Jones Act count for failure to state a claim. In a well reasoned decision examining *Executive Jet* and other related cases in detail, the court stated:

An airplane flying through the ozone does not appear to be a vessel within the meaning of an act addressed to the relief of seamen. The definition is not altered by the fact that the plane is equipped with gear that enables it to begin and end an airborne trip on water.

For these reasons, we conclude that, in *Smith*, the Jones Act claim was properly dismissed for its lack of merit. Jones [sic] was simply not a seaman or a member of the crew of a vessel.

**E. Longshoremen and Harborworker's Compensation Act**

The application of the Longshoremen and Harborworker's Compensation Act (Longshoremen's Act) to aviation claims can arise under other statutes such as the Defense Bases Act and the Lands Act. It can also be directly applied in areas such as offshore fishing and oil exploration. Under the Defense Bases Act, the provisions of the Longshoremen's Act are applied to civilian employees of the United States Government contractors working overseas. The provisions have also been applied to aviation related claims on several occasions.

The Longshoremen's Act has been directly applied to air-
craft crewmembers. In *Nalco Chemical Corp. v. Shea,*\(^{141}\) an employee of Nalco Chemical was killed while delivering chemicals to an offshore drilling facility.\(^{142}\) The decedent ordinarily accomplished his work either by boat or by piloting a seaplane. His death occurred during the course of his operation of a seaplane.\(^{143}\) The district court's application of the Longshoremen's Act to the pilot's claim without reference to the Lands Act was affirmed by the Fifth Circuit on the basis of the pilot's "maritime employment."\(^{144}\) In *Ward v. Director, Office of Workers Compensation Programs,*\(^{145}\) a Jones Act claim was asserted on behalf of an airplane pilot who died when his aircraft crashed while he was spotting fish in Gulf Coast waters for a commercial fishing fleet.\(^{146}\) Applying the rationale of *Nalco Chemical*, the Fifth Circuit relied on the statute's "maritime employment" test.\(^{147}\) The court determined that because the pilot was engaged in a "maritime occupation" and was performing that occupation at the moment of injury, he met the requirements of the Longshoremen's Act.\(^{148}\) With regard to the Jones Act claim, the court stated:

> In *Smith v. Pan Air Corporation...*, we [held] that a plane is not a vessel under the Jones Act. Because the statutes employ the selfsame language, and dovetail by design, we conclude that the pilot who is not entitled to Jones Act coverage is not excluded from the [Longshoremen's Act] benefits. The reference to "fishermen" in the House debate does not strain this conclusion. The term was, in 1927, evidently taken to mean those who fish from conventional vessels, not all who might one day perform the functions then performed by look-outs stationed on a ship's mast. . . .

> While the language of a statute is not frozen in the mold of the year of its adoption, and courts should construe statutory

\(^{141}\) 419 F.2d 572 (5th Cir. 1974).
\(^{142}\) Id. at 574.
\(^{143}\) Id. at 574.
\(^{144}\) Id. at 574.
\(^{145}\) 684 F.2d 1114 (5th Cir. 1982).
\(^{146}\) Id. at 1115.
\(^{147}\) Id. at 1115-16.
\(^{148}\) Id. at 1117.
words flexibly with an eye to legislative purpose, we are given no commission to determine what is socially useful. Those who serve on vessels were given a set of remedies because Congress considered it to be desirable. It does not follow that we should determine that either pilots, their employees, or society would be better served by classifying even pilots who spot fish as Jones Act seamen.\footnote{Id. at 1118.}

VI. CONTRACTUAL AND INSURANCE QUESTIONS

Claims arising out of exploration for a recovery of minerals can often be complicated by the contractual relationships between the parties. Typically, a company will contract for the drilling of a well and the erection of a fixed platform on the Outer Continental Shelf to facilitate well production. When the platform is erected, contracts will be entered into with various independent contractors for the operation of the platform, the feeding and care of the operators' employees and for the transportation of those employees to and from the shore. In most cases there will be a written contract between the company and the contractor. The contracts will define the responsibilities of the parties and, usually, require that the prime contractor and owner be indemnified against claims arising out of the operation. The contracts may also require that the prime contractor and owner be named as additional insureds under the contractor's insurance policies, that subrogation be waived, or both.

These contracts, sometimes termed "Master Service Agreements," can be onerous and may even require that the prime contractor and owner be indemnified against their own negligence. Such a provision, if clearly set out in the contract, can be enforced.\footnote{See Corbitt v. Diamond M Drilling Co., 654 F.2d 329 (5th Cir. 1981) (holding that an indemnity clause in a purchase order did not impose any obligation on an independent contractor to indemnify an oil and gas lease owner for the owner's independent liability to a third party where the clause did not expressly provide for such indemnity); Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255 (5th Cir. 1981) (holding that a party may contract against liability for its own negligence if this intention is clearly expressed by an agreement).} Any number of complications, however, can
arise depending on the contract language and insurance coverage. One point to be borne in mind is that insurance coverage and indemnity requirements may not necessarily be coequal. The ultimate loss may exceed policy limits. If that is the case, the contractor's underwriters will respond to their policy limits and the contractor must then respond under the indemnity provisions of the contract over and above policy limits. The contractor's policy may exclude coverage for the loss or, the prime contractor's and owner's claims for indemnity may be barred by public policy.

Louisiana and Texas, among other states, have enacted statutes which may bar or limit contractual indemnity provisions as well as certain contractual insurance requirements such as naming or waiving. These statutes are of specific concern to those involved with claims arising under the Lands Act. Each such case stands on its own; and therefore, it would be impossible to attempt to analyze the various problems individually because of the differences in contracts and policies of insurance which may come into play.

VII. OTHER CONSIDERATIONS WITH REGARD TO THE APPLICATION OF ADMIRALTY LAW TO AIRCRAFT

Additional considerations that must be recognized and dealt with include, but are not limited to, the questions of salvage, interests on judgments, direct action statutes, and punitive

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181 Ogea v. Loffland Bros. Co., 622 F.2d 186, 189-90 (5th Cir. 1980) (holding that where an offshore platform owner agreed to indemnify an operator for personal injury claims and the operator agreed to obtain insurance, the indemnity provision could be enforced against the owner only for damages in excess of the agreed amount of insurance).

182 See Wedlock v. Gulf Miss. Marine Corp., 554 F.2d 240 (5th Cir. 1977) (holding that owner of a barge, which was also the charterer of a tugboat, could not obtain indemnity from the tugboat owner's indemnity policy where the policy covered only acts of negligence by the barge owner acting as a charterer and the claim involved acts of negligence by the barge owner as a barge owner); Lanasse v. Travelers Ins. Co., 450 F.2d 580 (5th Cir.), cert. denied, 406 U.S. 921 (1971) (holding that indemnity policy issued to vessel owner and naming charterer as additional assured did not cover claim arising from charterer's independent acts of negligence).


damages. The loss of an aircraft at sea and the trial of either personal injury or property damage claims arising out of such a loss can be significantly affected by admiralty law. These considerations will be briefly addressed below.

A. Salvage

An aircraft lost at sea is subject to salvage and salvage claims by those who retrieve the aircraft. Considering the value of today's aircraft, operators have great incentive to retrieve the aircraft themselves. They must therefore act with care when entering into salvage contracts. The owner who requests assistance or abandons the aircraft may well find himself facing a claim against the aircraft for salvage. While he may not be exposed to personal liability unless he chooses to intervene in the proceeding, the owner may be forced to stand by and watch his aircraft sold in salvage. The sales price would then be subject to a substantial reduction through an award to the salvor.

B. Interest

With regard to property damage claims, admiralty law has become virtually uniform in that interest will be awarded from the date of loss, absent some substantial mitigating factor to the contrary. Admiralty courts can, and do, award prejudgment interest at the market rate. That is, the cost to the owner of borrowing the money to repair the aircraft is

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156 See Lambros Seaplane Base, Inc. v. The Batory, 215 F.2d 228 (2d Cir. 1954) (holding that a seaplane, when on the sea, is a marine object subject to the maritime law of salvage); Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921) (holding that a hydro-aeroplant while on water, is a “vessel” within admiralty jurisdiction); Norris, Marine Salvage of Fallen Aircraft, 30 N.Y.U.L. Rev. 1209 (1955); Knauth, Aviation and Salvage: The Application of Salvage Principles to Aircraft, 36 Colum. L. Rev. 224 (1936).

157 See, e.g., Bunge Corp. v. ACBL, 630 F.2d 1236 (7th Cir. 1980) (holding that owner of grain handling facility damaged by coal barges was entitled to interest on his damages from the date of the collision); Mobile Oil Corp. v. Tug Pensacola, 472 F.2d 1175 (5th Cir. 1973) (holding that the general rule in admiralty is to award interest from the date of the collision).
considered in determining the award of interest.\textsuperscript{158}

\section*{C. Direct Actions}

Louisiana and Wisconsin have direct action statutes.\textsuperscript{160} The application of the particular direct action statute in an admiralty claim, however, must be decided on a case by case basis.\textsuperscript{160} While a state direct action statute may not, in most cases be applied in admiralty claims, this rule is not a universal one.

\section*{D. Liens and Limitation of Liability}

Since an aircraft is not a "vessel,"\textsuperscript{161} its owner cannot claim limitation of liability as might a vessel owner.\textsuperscript{162} Similarly, since an aircraft is not a vessel, its crewmembers cannot assert maritime liens for wages.\textsuperscript{163} Nor are "seaplanes" subject to maritime liens for repairs.\textsuperscript{164}

\begin{footnotesize}
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\item See United States v. M/V Gopher State, 614 F.2d 1186 (8th Cir. 1980) (holding that pre-judgment interest in an admiralty suit should have been awarded at prevailing interest rate and not at the statutory rate of the state in which the claim arose); Complaint of M/V Vulcan, 553 F.2d 489 (5th Cir. 1977), cert. denied sub nom. Sabine Towing & Transp. Co., Inc. v. Zapata Uglund Drilling M.C., 434 U.S. 855 (1978) (holding that lower court's awarding of pre-judgment interest in an admiralty case at a rate equivalent to the injured party's cost of borrowing was not an abuse of discretion); Slater v. Texaco, Inc., 506 F. Supp. 1099 (D. Del. 1981) (holding that in a case arising out of maritime collision, the rate of pre-judgment interest which is to be awarded is within the discretion of the trial court and that prevailing interest rates should be taken into account).
\item See Continental Oil Co. v. London S.S. Owner's Mut. Ins. Ass'n, 417 F.2d 1030 (5th Cir. 1969) (holding that in an OCSLA suit, a Louisiana direct action statute was not adopted as federal law where there was no showing that admiralty remedies were in any way incomplete).
\item Nosakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939) (holding that a seaplane flying through the air is not a "vessel").
\item See 46 U.S.C. \S\S 189-196 (1976).
\item See id. \S 953. See also Chance v. United States, 266 F.2d 874, 875 (5th Cir. 1959) (holding that pilot whose duty consisted of flying a seaplane to spot fish for a fishing fleet was not a seaman and could not assert a maritime lien for his wages).
\item See United States v. Northwest Air Serv., 80 F.2d 804, 805 (9th Cir. 1938) (holding that a seaplane, while stored in a hanger on dry land, was not a vessel and not subject to maritime lien for repairs).
\end{itemize}
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E. Punitive Damages

The availability of punitive damages arising out of an offshore aviation claim has not yet been directly addressed. The Fifth Circuit was faced with a related issue in *In re Merry Shipping, Inc.* The question presented to the Fifth Circuit was whether punitive damages might be recovered in an action for the death of a seaman under the general maritime law, the Jones Act, or both. The Fifth Circuit did not answer the question with regard to the Jones Act, but did allow the plaintiff to assert a claim for punitive damages under the general maritime law. The claim arose out of the death of a member of a tugboat crew which sank in state waters in Port Royal Sound off the coast of South Carolina. The District Court dismissed the claim for punitive damages, holding as a matter of law that such damages were unavailable. The Fifth Circuit, however, reversed.

The difficulty of relating *Merry Shipping* to aviation claims is that the decision is cast in terms of the "unseaworthiness" of a vessel. Under general maritime law, the survivors of a seaman have a cause of action for death resulting from the unseaworthiness. Other claimants may also have a cause of action for negligence of the operator of the vessel. The damages recoverable include an award for the decedent's personal losses and his pain and suffering prior to death. The survivors may recover their pecuniary losses, including loss of services and support, as well as non-pecuniary losses including "loss of society."

Under the Jones Act, while claimants are entitled to recover damages for the decedent's personal losses and pain and suf-

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165 650 F.2d 622 (5th Cir.), reh'g denied, 659 F.2d 1079 (1981).
166 *Id.* at 625.
167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.* at 625-26.
171 See supra text accompanying notes 55-57.
172 Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 591 (1974) (holding that the maritime wrongful death remedy permits a decedent's dependents to recover damages for loss of support, services, society as well as damages for funeral expenses).
fering prior to death, the survivors are limited to recovery of pecuniary losses. Non-pecuniary damages such as loss of society are not available.\textsuperscript{177} In \textit{Merry Shipping}, the Fifth Circuit stated that punitive damages "should" not be available against a ship owner under general maritime law because:

\textit{First}, unlike the Jones Act, no statutory restraints bar recovery under general maritime law. This body of law is wholly a product of judicial decisionmaking, fashioned on the basis of tradition and policy. \textit{Second}, courts have long recognized that unlike under the Jones Act and the FELA, nonpecuniary losses are recoverable under general maritime law. \textit{Third}, recovery of punitive damages is restricted to where there is willful and wanton misconduct, reflecting a reckless regard for the safety of the crew, a much higher standard of culpability than that required for Jones Act liability.\textsuperscript{174}

The court addressed the Jones Act aspects of the claim to the extent of pointing out that the district court might well be correct in determining that punitive damages were not recoverable under the Jones Act.\textsuperscript{175} This particular point, when considered in light of the issues previously discussed,\textsuperscript{176} raises serious doubts as to the availability of punitive damages in an aviation claim.

Under the Jones Act, claimants are entitled to pecuniary damages. Under the FELA, to which the Jones Act specifically refers for its remedies, punitive damages may not be recovered.\textsuperscript{177} \textit{Merry Shipping} approaches unseaworthiness, a virtual strict liability concept,\textsuperscript{178} from the point of view of cul-

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\textsuperscript{174} 650 F.2d at 626. \textsuperscript{175} Id. \textsuperscript{176} See supra text accompanying notes 70-73. \textsuperscript{177} Kozar v. Chesapeake & Ohio Ry., 449 F.2d 1238, 1243 (6th Cir. 1971) (holding that damages recoverable under FELA in case of railroad employee suffering injury or death on the job are compensatory only and punitive damages are not recoverable). \textsuperscript{178} See Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549-50 (1960) (holding that a shipowner's duty to furnish a seaworthy ship is absolute and not limited by concepts of common-law negligence); Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944) (holding that a shipowner's duty to furnish seamen with a safe place to work and safe
pability, a difficult task at best. Whether that concept can successfully be applied in the aviation context to award punitive damages under general maritime law is questionable. Further, like the Jones Act, the DOHSA speaks in terms of "pecuniary" damages. Under Higginbotham, DOHSA applies beyond three nautical miles from the State shoreline. Thus, it would appear that if punitive damages are found to be available to claimants seeking damages for crashes of aircraft on navigable water, such damages may only be available for those with claims arising between the shoreline and the three nautical mile limit of DOHSA. Such a determination would not be consistent with the admiralty courts' desire for uniformity but could be justified under the Moragne rationale.

VIII. Conclusion

Claims arising out of offshore aircraft operations can create numerous problems because of the involvement of admiralty and maritime law. These problems can affect all aspects of the litigation. Considerations with regard to forum are subject to a determination of the existence of sole or concurrent jurisdiction in state and federal courts. Pleading differences under the admiralty law can subject third-party defendants to direct liability to the plaintiff. The requirement of uniformity of application of the federal maritime law means that, regardless of the forum, federal maritime law will apply. Yet, with regard to operations on fixed platforms located on the Outer Continental Shelf, state law comes into play and has a direct effect on theories of liability and damages. While aircraft are not vessels, they are subject to the maritime law of salvage, exposing the owners and insurers of aircraft to risks and liabilities for which they might not otherwise be liable had the aircraft been lost ashore. The fact that aircraft are not considered vessels

\[\text{appliances is nondelegable).}\]

179 650 F.2d at 625-26.

180 Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), discussed supra at text accompanying notes 67-70.

181 See supra text accompanying note 73.

may prevent the owner from being exposed to maritime liens and employee claims but their use in "maritime" operations can expose the owner to different and perhaps greater compensation exposure with regard to crew claims.

In brief, a careful and reasoned approach must be taken with regard to aviation claims arising out of offshore operations. Such claims require evaluation with regard to a law which differs substantially from that applied to shoreside aviation claims. In addition, contractual relationships between the parties can sometimes expose operators to liabilities of others to which they might otherwise not be exposed. Because of the ever increasing involvement of operators and insurers with both domestic and foreign offshore operations, knowledge of the maritime law is necessary to allow them to provide the services which they have previously provided ashore and to properly assess the risks to which they are exposed.