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Admiralty Tort Jurisdiction and Aircraft Accident Cases: Hops, Skips, and Jumps into Admiralty

R. Alan Haywood

Note

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Admiralty law, while not as old as the sea, is as old as commerce upon the sea. Maritime law arose from the need to regulate the peculiar interests of seagoing commerce and the history of its development can be traced through the history of the great seagoing nations of the world.[1] Following this historical precedent, the Constitution provides that the judicial power of the United States shall extend to "all cases of admiralty or maritime jurisdiction."[2] Congress has vested original jurisdiction of "any civil case of admiralty or maritime jurisdiction" in the federal district courts,[3] but there is no attempt by the Constitution or Congress to define the boundaries of that jurisdiction. Consequently, "the precise scope of admiralty jurisdiction is not a matter of obvious principle or very accurate history."[4]

Admiralty jurisdiction, originally restricted to the high seas or to the waters between the ebb and flow of the tide,[5] has been expanded to encompass all navigable waters.[6] Largely as a result of the historical conflict between the English common law and admiralty courts,[7] an anomaly developed concerning the jurisdictional basis for contract and tort actions in admiralty. Admiralty jurisdiction of contract actions depends on the "maritime nature" of the con-

[1] G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 1-8 (1957) (hereinafter cited as GILMORE & BLACK); 7A J. MOORE, FEDERAL PRACTICE ¶ .200[1], at 2011-14 (2d ed. 1968) (hereinafter cited as MOORE); G. ROBINSON, HANDBOOK OF ADMIRALTY LAW 2 (1939); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950); Ingold, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?*, 1968 U. ILL. L. FORUM. 95, 96-97.

[2] U.S. CONST. art. III, § 2.

[3] 62 Stat. 931 (1948), 28 U.S.C. § 1333 (1970).

[4] The Blackheath, 195 U.S. 361, 365 (1904).

[5] The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825); Thomas v. Lane, 23 F. Cas. 957 (No. 13,902) (C.C.D. Me. 1813).

[6] 53 U.S. (12 How.) 443 (1851). *See generally* GILMORE & BLACK at 28-30; MOORE at 2071-78.

[7] GILMORE & BLACK at 8. *See* note 1 *supra.*

tract, but admiralty jurisdiction over torts depends on the "locality" of the tort.[8]

The aviation industry is rapidly replacing the shipping industry as the principle means of interstate and intercontinental commerce and the resulting increase in aircraft accidents on the high seas and navigable waters has called into sharp focus the maritime status of such accidents and the need for resolution of the confusion of admiralty tort jurisdiction.[9]

Although the locality test for maritime torts is generally accepted, its simplicity is deceptive. Within those courts adopting the locality test, there is disagreement whether the locality of the origin of the tortuous conduct or the locality of the consummation of the tort is the "locality" which controls.[10] Moreover, the locality test has been criticized as an historical oddity bearing no relation to the true function of admiralty, which is the regulation of seagoing commerce; therefore, some courts require that the tort not only occur on navigable waters, but also be of a "maritime" nature.[11]

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[8] The Plymouth, 70 U.S. (3 Wall.) 20 (1865); The Philadelphia, Wilmington & Baltimore R.R. Co. v. The Philadelphia & Harve De Grace Steam Towboat Co., 64 U.S. (23 How.) 209 (1859); De Lovio v. Boit, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

[9] Among the advantages of admiralty jurisdiction is that the plaintiff can bring suit in the federal courts where there is no diversity of citizenship, Payroux v. Howard, 32 U.S. (7 Pet.) 324 (1833); where there is absence of the jurisdictional amount, Stratton v. Jarvis, 33 U.S. (8 Pet.) 4 (1834); where there is no independent jurisdictional basis, The Robert W. Parsons, 191 U.S. 17 (1903); and is not limited to the venue requirements of ordinary cases, MOORE, ¶ 66, at 499. In addition, contributory negligence does not bar recovery, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), and comparative negligence is applied, Movible Offshore Co. v. Ousley, 346 F.2d 870 (5th Cir. 1965). Assumption of the risk has been held not to prevent recovery, King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963). *But see* Gaderson v. Texas Contracting Co., 3 F.2d 140 (5th Cir. 1924), where assumption of the risk was applied to deny recovery. For other advantages of admiralty, see Moore & Pelaez, *Admiralty Jurisdiction: The Sky's the Limit*, 33 J. AIR L. & COM. 3-4 (1967).

[10] *See* The Admiral Peoples, 295 U.S. 649 (1935); The Minnie v. Port Huron Co., 295 U.S. 647 (1935); Wiper v. Great Lakes Engineering Works, 340 F.2d 727 (6th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965); The Strabo, 98 F. 998 (2d Cir. 1900); Thompson v. Chesapeak Yacht Club, Inc., 255 F. Supp. 555 (D. Md. 1965).

[11] Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Campbell v. H. Hackenfield & Co., 125 Fed. 696 (1903); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961); 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY § 127 (6th ed. 1940); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 260 (1950); Ingold, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?*, 1968 U. ILL. LAW FORUM 95

The Supreme Court has yet to rule directly on the question of the applicability of maritime jurisdiction to aircraft accidents on navigable waters and its decisions involving non-aviation admiralty tort cases conflict. In *The Plymouth*[12] a vessel anchored near a wharf caught fire. The fire spread to the wharf and damaged several warehouses nearby. The Supreme Court denied admiralty jurisdiction since the "substance and consummation of the injury" was on land, although the origin of the injury occurred on the water.[13]

Smith & Son v. Taylor[14] involved a worker who, while unloading a ship, was knocked from the wharf into the harbor. The Supreme Court held the blow giving rise to the cause of action "was given and took effect" on land and denied admiralty jurisdiction.[15] The converse situation was involved in *The Admiral Peoples.*[16] A passenger disembarking from a ship fell from the gangplank onto the dock. The Court found admiralty jurisdiction reasoning "the cause of action originated and the injury commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water."[17] Although the Court cited *The Plymouth* in both *Smith & Son v. Taylor* and *The Admiral Peoples*, the test used to determine the "locality" in these more recent cases was the origin and not the consummation of the tortuous conduct. This conflict in approach creates the initial confusion.

Whether the inception or the consummation of the tort is the standard used, the locality test has been subject to criticism on the grounds that admiralty jurisdiction should not rest on the happenstance of a tort occurring on navigable water, but rather like maritime contracts, should bear some relation to navigation, business or commerce of the seas.[18] This additional requirement is termed the

(1968); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM. L. REV. 1084 (1964).

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

[13] *Id.* at 33.

[14] 276 U.S. 179 (1928).

[15] *Id.* at 182.

[16] 295 U.S. 649 (1935).

[17] *Id.* at 652-53 *citing* The Strabo, 98 F. 998 (2d Cir. 1900).

[18] *See* note 10 *supra.*

"locality plus" test. The first judicial expression of this concept is found in *Campbell v. H. Hackenfield & Co.*,[19] where the Ninth Circuit stated:

> The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs.[20]

The Supreme Court, when confronted with the "locality plus" theory, stated that the theory was "too narrow." The Court avoided the issue of the validity of the theory by finding that even if more than locality alone was required, the facts before it satisfied any additional "plus."[21]

The best illustrations of the use of "locality plus" are *McGuire v. City of New York*[22] and *Chapman v. City of Grosse Pointe Farms*.[23] In *McGuire* the plaintiff was injured while swimming at a public beach. The district court found no admiralty jurisdiction stating that the locality test was a rule of exclusion or limitation and that a tort occurring on navigable water was merely prima facie within admiralty.[24] The plaintiff in *Chapman* was injured diving into shallow water from the side of a pier. The court of appeals denied admiralty jurisdiction stating that "[s]ome relationship between the alleged wrong and maritime service, navigation or commerce on navigable waters, is a condition *sub silentio* to admiralty jurisdiction."[25] Limiting *McGuire* and *Chapman* to the particular facts involved, it is undeniable that to allow such actions would have contravened the traditional function of admiralty.[26] As the court in *McGuire* properly noted, the touchstone of ad-

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[19] 125 Fed. 696 (9th Cir. 1903). The first expression of an additional requirement for admiralty jurisdiction is found in 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY 173 (1850) and has come to be known as Benedict's "famous doubt."

[20] *Id.* at 697. For a criticism of the district court's decision, see Note, 16 HAR. L. REV. 210 (1902).

[21] Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 61 (1914).

[22] 192 F. Supp. 866 (S.D.N.Y. 1961).

[23] 385 F.2d 962 (6th Cir. 1967).

[24] McGuire v. City of New York, 192 F. Supp. 866, 869 (S.D.N.Y. 1961).

[25] Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).

[26] Crenshaw, *Airplanes in Admiralty*, 18 S. CAR. L. REV. 572 (1966).

miralty is "an intimate relation with navigation and interstate and foreign commerce."[27] Unfortunately, the use of the "locality plus" test in these cases has created another dichotomy which compounds the initial confusion of origin-consummation.[28]

The question of the applicability of admiralty jurisdiction to aircraft accidents occurring on the high seas or on navigable waters increases the confusion. Illustrative of this problem is *Executive Jet Aviation, Inc. v. City of Cleveland*[29] which involved a jet aircraft which collided with several hundred sea gulls seconds after take-off from Burke Lakefront Airport. The aircraft had flushed the gulls from the runway as it took off. The collision resulted in an immediate loss of power causing the plane to descend striking the airport perimeter fence and a pick-up truck before settling into Lake Erie just off shore. The owners of the plane sued in federal district court alleging negligence and claiming admiralty jurisdiction. The Sixth Circuit affirmed the trial court's dismissal for lack of jurisdiction in admiralty, holding that the cause of action arose on land since the negligence "was given and took effect" on land, although the damage was consummated in the navigable waters of Lake Erie.[30] The majority reaffirmed the "locality alone" test following *The Admiral Peoples* approach that the origin of the tort is the locality which controls. Judge Edwards, however, forcefully dissented urging acknowledgment of federal jurisdiction in admiralty for aircraft accidents on navigable water.[31]

In applying the principles governing admiralty jurisdiction to such borderline cases the courts have made distinctions so fine as to be non-existent.[32] *Executive Jet* illustrates the conflict resulting when an aviation accident is thrust into the historical concepts of

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[27] McGuire v. City of New York, 192 F. Supp. 866, 871 (S.D.N.Y. 1961).

[28] An example of the problem created is King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963), where a water skier was allowed to recover in admiralty due to the finding of "maritime" connection through the fact that plaintiff was injured while being pulled by a boat.

[29] 448 F.2d 151 (5th Cir. 1971). The Supreme Court has granted a writ of certiorai to review the case, but no opinion has been issued as of this writing.

[30] *Id.* at 154.

[31] *Id.* at 155-64.

[32] *Compare* The Brand, 29 F.2d 792 (D. Ore. 1928) *and* The Aetna, 297 Fed. 673 (W.D. Wash. 1924) in which the direction the passenger was proceeding on the gangplank in a situation similar to that in *The Admiral Peoples* determined whether the case lay in admiralty.

admiralty tort jurisdiction. The majority decided the case within the traditional framework of non-aviation maritime tort law, *i.e.*, did the cause of action arise on land or on navigable water?[33] Judge Edwards, recognizing the important policy question involved, would have decided the case within the framework of whether the federal courts have maritime jurisdiction over aircraft crashes on navigable waters.[34]

To understand the significance of *Executive Jet*, it is necessary to trace the development of admiralty jurisdiction with regard to aircraft accidents within the federal courts. In *Lacey v. L. W. Wiggins Airways, Inc.*[35] an aircraft went down off Cape Cod as a result of engine failure. A wrongful death action was instituted alleging the cause of the accident was the failure to inspect the plane before takeoff. The district court held the locus of the tort was the place where the injury was inflicted and allowed the action in admiralty.[36] In addition, the Federal Death on the High Seas Act (DOHSA) was held to apply to aircraft accidents on the high seas.[37]

Wilson v. Transocean Airlines[38] reaffirmed the admiralty jurisdiction of aircraft accidents on the high seas. The district court stated that "in applying the 'locality' test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action."[39] In *D'Aleman v. Pan American World Airways*[40] a similar conclusion was reached. A passenger on a flight from Puerto Rico to New York became terrified when the plane developed engine trouble and was forced to feather one engine. The passenger went into a state of shock which resulted in his death several days later. In upholding admiralty jurisdiction under the DOHSA, the court of appeals concluded the words "on the high seas" should be capable of exten-

[33] Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 152 (6th Cir. 1971).

[34] *Id.* at 155.

[35] 95 F. Supp. 916 (D. Mass. 1951).

[36] *Id.* at 918.

[37] *Id.*

[38] 121 F. Supp. 85 (N.D. Cal. 1954).

[39] *Id.* at 92.

[40] 259 F.2d 493 (2d Cir. 1958).

sion to include "under" and "over" the high seas. The court noted this construction prevents the anomaly that a person on a ship would be protected, but that person several thousand feet above it would not be afforded similar protection.[41]

Until *Executive Jet* the law on admiralty jurisdiction for aviation torts was considered settled by *Weinstein v. Eastern Airlines, Inc.*[42] As in *Executive Jet*, an aircraft crashed into navigable water shortly after takeoff.[43] The court of appeals reasoned that if a tort claim arising out of an aircraft accident beyond one league from shore is within admiralty, citing the prior DOHSA aviation cases, then a fortiori a crash within that limit must also be within maritime jurisdiction.[44] "To hold otherwise would be to impose an illogical and irrational distinction on the operation of the broad grant of admiralty jurisdiction extended by the Constitution and implemented by 28 U.S.C.A. 1333."[45]

The court in *Weinstein* also concluded that the Supreme Court had rejected the "locality plus" test in *Atlantic Transport Co. v. Imbrovek*,[46] but continued, assuming arguendo a maritime nexus was required, that an aircraft crash on navigable water satisfied the standard.[47] By way of justification, the court noted:

> At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.[48]

Recognizing the need for revision of the concepts of admiralty jurisdiction, the court adopted the rule that an aircraft on navigable

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[41] *Id.* at 495.

[42] 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

[43] The action was based on the state wrongful death statute since the DOHSA specifically states that its provisions apply only to acts occurring "beyond one marine league from the shore." 41 Stat. 537, 46 U.S.C. § 761 (1970).

[44] Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 765 (3d Cir. 1963).

[45] *Id.*

[46] 234 U.S. 52 (1914). *See* note 21 *supra.*

[47] Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 763 (3d Cir. 1963).

[48] *Id.*

waters is recognizable in admiralty.[49]

The *Weinstein* approach has been followed by a number of courts as much from policy considerations as from the application of the locality consummation test.[50] In addition, the practical problems of proving the cause, let alone the origin, of aircraft accidents on the high seas and the consequential reliance on res ipsa loquitur theories reinforce the rejection of the inception approach to admiralty tort jurisdiction. Despite these considerations, the Sixth Circuit in *Executive Jet* found that such a crash was not within maritime jurisdiction. This holding appears to be contrary to the great weight of authority for aviation cases as typified by *Weinstein.* In view of the considerable confusion in the general area of admiralty tort jurisdiction, such a result is not surprising. Moreover the solution of this problem is far from simple.

In resolving the policy question whether admiralty jurisdiction should be extended to aircraft accidents on navigable waters, aircraft have generally not been considered "vessels" in maritime law.[51] Airplanes are not subject to the maritime rules regarding burden of proof;[52] aircraft crew members are not considered "seamen" within the Jones Act;[53] aircraft owners cannot limit liability

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[49] *Id.* at 766.

[50] *See* Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir. 1968), *cert. denied,* 393 U.S. 979 (1968); Hornsby v. Fishmeal Co., 285 F. Supp. 990, 993 (W.D. La. 1968), *rev'd on other grounds,* 431 F.2d 865 (5th Cir. 1970); Rapp v. Eastern Airlines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967), *aff'd,* Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir. 1968); Harris v. United Airlines, Inc., 275 F. Supp. 431 (S.D. Iowa 1967); Horton v. J & J Aircraft, 257 F. Supp. 121 (S.D. Fla. 1966); Davis v. City of Jacksonville Beach, Fla., 251 F. Supp. 327 (M.D. Fla. 1965); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964). *See also* Hughes, *Recent Changes in Admiralty Tort Jurisdiction,* 30 ALA. LAWYER 328, 332 (1968). Moore & Pelaez, *Admiralty Jurisdiction: The Sky's the Limit,* 33 J. AIR L. & COM. 3, 33-38 (1967).

[51] "[T]he navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." 75 Stat. 527 (1964), 49 U.S.C. § 1509(a) (1970). *See* Knauth, *Aviation and Admiralty, An Investigation of Some Admiralty and Maritime Doctrines Useful to Aviation,* 6 AIR L. REV. 226 (1935); Veeder, *The Legal Relations Between Aviation and Admiralty,* 2 AIR L. REV. 29 (1931).

[52] Geoger v. United States, 1949 U.S. Av. Rep. 113 (E.D. Va. 1949).

[53] Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Stickrod v. Pan American Airways Co., 1941 U.S. Av. Rep. 69 (S.D.N.Y. 1941).

in fatal crashes at sea;[54] creditors cannot assert maritime liens against aircraft;[55] and aircraft do not comply with maritime rules of the road.[56] On the other hand, in addition to the application of DOHSA to aviation accidents,[57] the admiralty jurisdiction has been modified to include crimes committed on aircraft.[58] While airplanes have many features in common with seagoing vessels, there are great differences. An airplane may have a "maritime" connection while over the high seas, but this connection does not exist inherently in aviation making all flights, including those over land, maritime in nature.

Logic offers no ready answer to the problem due to the hybrid nature of aircraft. What logic exists for granting an aircraft passenger admiralty jurisdiction when the plane crashes on water, yet denying the same passenger such jurisdiction if the plane descends to land either before crossing navigable water or after crossing over it? Likewise as noted in *Weinstein*, why should a passenger on a ship be allowed to sue in admiralty for a tort originating on land and consummated on the high seas, while a passenger of a plane is denied jurisdiction for a tort having its inception on land, but culminating on water?

The courts confronted with this dilemma have sought refuge in

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[54] Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939); Dollins v. Pan American Grace Airways, Inc., 27 F. Supp. 487 (S.D.N.Y. 1939).

[55] United States v. Northwest Air Serv., 80 F.2d 804 (9th Cir. 1935); United States v. One Waco Bi-Plane, 1933 U.S. Av. Rep. 159 (D. Ariz. 1932); Foss v. Crawford Bros. No. 2, 215 Fed. 269 (D. Wash. 1914).

[56] 72 Stat. 799 (1958), 49 U.S.C. § 1509(a) (1970).

[57] *See* D'Aleman v. Pan American World Airways, 259 F.2d 493 (2d Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957); Lavello v. Danko, 175 F. Supp. 92 (S.D.N.Y. 1959); Noel v. Airponents, Inc., 169 F. Supp. 94 (D.N.J. 1958); Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957); Higa v. Transocean Airlines, 124 F. Supp. 13 (D. Hawaii 1954), *aff'd*, 230 F.2d 780 (9th Cir. 1955), *cert. denied*, 352 U.S. 802 (1956); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Atchenson v. United States, 1949 U.S. Av. Rep. 72 (N.D. Cal. 1949); Choy v. Pan American Airways Co., 19 Am. Mar. Cas. 483 (S.D.N.Y. 1941); Wyman v. Pan American Airways, Inc., 181 Misc. 963, 43 N.Y.S. 2d 420 (Sup. Ct. 1943), *aff'd mem.*, 267 App. Div. 947, 48 N.Y.S. 2d 459, *aff'd mem.*, 293 N.Y. 878, 59 N.E.2d 785 (1944); *see generally* Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM. L. REV. 1084 (1964); Comment, 55 COLUM. L. REV. 907 (1955); Annot., 66 A.L.R.2d 1002 (1959).

[58] 66 Stat. 589, 18 U.S.C. § 7(5) (1970); 58 Stat. 111 (1944), 18 U.S.C. § 2199 (1970).

the mechanical application of the locality test attaching admiralty jurisdiction to an aircraft only when the aircraft is above navigable waters, or, as the court in *Executive Jet*, effectively denying admiralty jurisdiction by looking to the origin of the tort which will virtually always be land-based.

Several commentators have argued for federal legislation to resolve the problem.[59] The rationale supporting this conclusion is that air commerce is too vital to be left to the fortuity of the geography of occurrence or to be governed by a curious and haphazard combination of maritime and non-maritime law. Therefore, air commerce should be subject to special principles particularly suited to the peculiar needs of the aviation industry.[60]

There have been attempts in Congress to establish a uniform body of federal law designed to resolve the conflict of laws and multiple trial problems of aviation accidents. In 1968 the "Holtzoff Bill" was introduced which would have created exclusive federal jurisdiction over any action arising out of accidents involving interstate or foreign aircraft operations.[61] The bill was criticized because of the inclusion of private aircraft and the exclusion of intrastate air carriers and the proposal died in committee.[62] The following year Senator Joseph Tydings introduced a revised bill which would have limited the grant of exclusive federal jurisdiction to aviation accidents involving aircraft operated as common carriers, defined by the bill as aircraft having a seating capacity of ten or more persons, and accidents resulting in the death or personal injury of five or more persons.[63] Opposition to the proposal centered on the

[59] Ingold, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?*, 1968 U. ILL. LAW FORUM 95 (1968); Moore & Pelaez, *Admiralty Jurisdiction: The Sky's the Limit*, 33 J. AIR L. & COM. 3 (1967); Stewart, *Aviation Challenges Admiralty Jurisdiction: Sink or Swim in the Sea of Uncertainty*, 35 J. AIR L. & COM. 616 (1969); Sweeney, *Is Special Aviation Liability Legislation Essential?*, 19 J. AIR L. & COM. 166 (1952); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 COLUM. L. REV. 1084 (1964); Comment, 55 COLUM. L. REV. 907 (1955).

[60] Moore & Pelaez, *Admiralty Jurisdiction: The Sky's the Limit*, 33 J. AIR L. & COM. 3, 37 (1967).

[61] S. REP. No. 3305, 90th Cong., 2d Sess. (1968). The proposal was authored by the late Judge Alexander Holtzoff of the U.S. District Court for the District of Columbia.

[62] *Hearings on S. 3305 & S. 3306 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., 28 (1968).

[63] S. REP. No. 961, 91st Cong., 1st Sess. (1969).

creation of a federal body of tort law which would "flood the Federal courts with litigation which presently is processed in the state courts."[64] The Tydings bill was never reported from committee and since the defeat of Senator Tydings, the strongest and often the sole proponent of unification, in 1970, there have been no attempts to create a uniform body of substantive law for aviation accidents.

This legislation for commercial aviation would have paralleled the creation of admiralty jurisdiction for the special needs of seagoing commerce. It would have ended the confusion which currently plagues the industry. This legislation would have eliminated the application of the varied procedures and remedies of each state or port where the accident occurs and would have provided a uniform standard for the national aviation industry.[65]

However advantageous such a solution would be, based on the failure of past attempts, it does not appear that Congress will provide the needed legislation in the near future, and until such legislation can be provided, the courts must resolve the dilemma.[66] It has been suggested that the courts should develop a federal common law of aviation to fill the void left by the legislature.[67] The federal courts have not been adverse to the development of "federal common law" in areas where federal rights are involved.[68] The potential for the development of a body of federal common law for aviation is best illustrated by the fashioning of the federal law in the field of labor relations based on the Supreme Court's decision

[64] *Hearings on S. 3305 & S. 3306 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., 69 (1969). (Statement of Walter H. Bechman, Jr.). *See generally* Sanders, *The Tydings Bill, Symposium on Air Accident Investigation and Litigation*, 36 J. AIR L. & COM. 550 (1970); Comment, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 MO. L. REV. 215 (1970); Note, *Aircraft Crash Litigation*, 38 GEO. WASH. L. REV. 1052 (1970); Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299 (1969).

[65] Pelaez, *Admiralty Tort Jurisdiction: The Last Barrier*, 7 DUQUESNE L. REV. 1, 42 (1968).

[66] It has been suggested that the courts should refrain from extending admiralty to aircraft accident cases to prevent unwarranted analogy and inappropriate conclusions. Moore & Pelaez, *Admiralty Jurisdiction: The Sky's the Limit*, 33 J. AIR L. & COM. 3, 38 (1967).

[67] Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests and Teapots*, 37 J. AIR L. & COM. 3, 15-17, 47-48 (1971).

[68] *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

in *Textile Workers v. Lincoln Mills.*[69] The Supreme Court held that since section 301 of the Labor Management Relations Act of 1947[70] allows a labor union to sue or be sued in a federal court, the federal courts are authorized to fashion a body of federal law for the enforcement of collective bargaining agreements. However, Congress has not provided an aviation counterpart to the Labor Management Relations Act upon which *Lincoln Mills* is based. Moreover, the reluctance of the federal courts to formulate such rules of decision in aviation litigation is understandable, if not wholly justified, when one considers the traditional opposition to the judiciary assuming the function of the legislative branch of the government.

In view of the failure to adopt either the common law or legislative alternatives, the courts would do well to follow the *Weinstein* approach and ignore *Executive Jet* as precedent. As Judge Edwards properly noted in his dissent, the issue is whether the federal courts have jurisdiction over aviation accidents on the high seas. Several commentators have suggested, in regard to admiralty torts in general, the adoption of the contract concept of maritime jurisdiction by following a modification of the "locality plus" test as the first step in ending the confusion surrounding the present status of admiralty tort jurisdiction.[71]

The coalescence of contract and tort principles in admiralty would be particularly suited to the problem of aviation admiralty torts. As the court in *Weinstein* concluded in view of the technology of the modern day interstate and foreign commerce, concepts of admiralty cannot remain static. Although aviation may not be inherently maritime in nature, when an aircraft is over navigable waters and accomplishing the traditional ends of seagoing commerce, sufficient maritime character attaches to justify inclusion in admiralty. The wholesale adoption of the *Weinstein* rule, a process considered complete until *Executive Jet*, would settle finally the issue and end the confusion which the Sixth Circuit has increased. The courts in admiralty, like the vessels, men and tech-

[69] 353 U.S. 448 (1957).

[70] 29 U.S.C. § 185 (1970).

[71] *See* note 59 *supra.*

nology to which it applies, must be propelled into the Twentieth Century.[72]

R. Alan Haywood

[72] Pelaez, *Admiralty Tort Jurisdiction: The Last Barrier*, 7 DUQUESNE L. REV. 1, 43 (1968).