Hops, Skips and Jumps into Admiralty Revisited

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On July 28, 1968, a jet aircraft owned and operated by petitioners, struck a flock of seagulls seconds after taking off from Burke Lakefront Airport in Cleveland, Ohio. The aircraft was departing on a charter flight to Portland, Maine where it was to pick up passengers and continue on to White Plains, New York. The seagulls, flushed from the runway by the jet as it became airborne, ascended into the airspace directly ahead of the plane and over the runway. Ingestion of the birds into the aircraft's engines resulted in an immediate and substantial loss of power. Descending while still over land, the plane struck a portion of the airport perimeter fence and the top of a pickup truck before settling in Lake Erie less than one-fifth of a statute mile from shore. While no one was killed or injured, the jet, as a result of its soaking in the waters of Lake Erie, was a total loss.¹

The petitioners, invoking federal admiralty jurisdiction² brought a damage suit in the Northern District of Ohio against the air traffic controller, the City of Cleveland as owner and operator of the airport and against the airport manager.³ The complaint alleged that the loss of the aircraft resulted from the respondents' negligent failure to keep the runway clear of the gulls or give adequate warning of their presence.

In an unreported decision, the district court dismissed the suit for lack of subject matter jurisdiction. This court held that two criteria must be met in order to invoke federal admiralty tort juris-

² This factual situation gave rise to the damage suit in Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972).
³ 28 U.S.C. § 1333(1) (1971) provides:
   The district courts shall have original jurisdiction exclusive of the courts of the States, of:
   (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
⁴ The petitioners also brought a separate suit against the United States as the air traffic controller's employer under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 claiming negligence. That action is pending in the District Court for the Northern District of Ohio, 409 U.S. at 251 n.3.
dict: (i) the locality where the alleged tortious wrong occurred must have been on navigable waters (the locality test); and (ii) there must have been a relationship between the wrong and some maritime service, navigation or commerce on navigable waters (the maritime nexus test). It ruled that neither criterion had been satisfied.

In affirming the decision, the court of appeals held that since the alleged tort had occurred on land before the plane reached the waters of Lake Erie, there was no maritime "locality." Therefore, found it unnecessary to consider whether a maritime nexus was required or satisfied. The Supreme Court granted certiorari.

For a unanimous Court, Mr. Justice Stewart held, affirming: "In the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." The Supreme Court reached this result by finding that in aviation crashes a "locality plus maritime nexus" test must be satisfied in order to ground admiralty tort jurisdiction. Maritime locality alone being insufficient, the alleged wrong must also bear a significant relationship to a traditional maritime activity. The Court rejected the option of affirming the trial courts' decisions on the basis of no maritime locality as the Court of Appeals did; had the Court exercised this option, they would have been able to avoid the question of what is the appropriate test for applying admiralty jurisdiction. Instead, the Supreme Court seized the opportunity to make its first definitive pronouncement on this long-standing controversy. Though traditionally accepted as the determining factor, the exclusivity of the locality test had long been open to doubt and

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\[409\text{ U.S. at 251.}\]
\[448\text{ F.2d 151 (1971).}\]
\[\text{Id. at 154-55.}\]
\[\text{Id. The single dissenter, without advocating the adoption of a "locality plus nexus" test, felt that a sufficient maritime nexus existed when an aircraft crashed into navigable waters, even if the negligent conduct was alleged to have occurred wholly on land. Id. at 163.}\]
\[405\text{ U.S. 915 (1972).}\]
\[409\text{ U.S. at 274.}\]
\[\text{Id. at 268.}\]
\[\text{Id. at 258.}\]

In 1850, Judge Benedict first questioned whether marine locality was enough or that some relationship of the parties to the ship may also be necessary. Benedict, The Law of American Admiralty, 173 (1850).
had evoked considerable criticism and confusion. The Court in *Executive Jet Aviation Inc. v. City of Cleveland, Ohio*, felt the uncertainty had survived long enough. In so doing, while holding that an intracontinental flight of a land based aircraft would not give rise to a sufficient maritime nexus, the Court refused to shed much light upon the question of what would. Intent on firmly establishing and explaining the need for a maritime nexus in the test for jurisdiction, the Supreme Court did not reach the question of locality since it found there to be no sufficient maritime nexus.

The decision in *Executive Jet* is an attempt to harmonize and rationalize the relationship of admiralty law to aircraft and to dispell the notion that locality is the exclusive test for admiralty tort jurisdiction. *Executive Jet’s* recognition of “locality plus” as the appropriate test is a sound decision and can be sustained by both constitutional analysis and a study of previous case law. Though the influence of this case on admiralty law will be substantial, its precise effect is somewhat muddied by the Court’s failure to come to grips with what constituted a sufficient maritime nexus. Also, while this decision represents a step in the right direction, it still leaves room for the application of admiralty jurisdiction to aviation mishaps under certain circumstances. Because this possibility still exists, Congress should move to exclude all aircraft cases from admiralty cognizance.

I. Admiralty Tort Jurisdiction and the Constitution

While the Supreme Court in *Executive Jet* neither refers to nor explicitly relies on the Constitution in rendering its decision, its ruling is strengthened and sanctioned by constitutional analysis.

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14 The Supreme Court, though possessing ample opportunity to do so, preferred to avoid the issue on previous occasions. In Atlantic Transport Co. v. Imbrotek, 234 U.S. 52 (1914), a case involving a longshoreman injured on a vessel, the Court skirted the issue of the exclusivity of locality by remarking that even if more than locality was required, sufficient maritime nexus was also present in the case. Id. at 61, 62. Similarly, after the Court of Appeals for the Third Circuit in Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (1963) had ruled that locality alone was sufficient to ground admiralty tort jurisdiction when air planes crashed on navigable waters, the Supreme Court denied certiorari. 375 U.S. 940 (1963).

18 409 F.2d at 272.
This analysis supports the proposition that "locality plus" is the appropriate test for all admiralty tort jurisdiction cases, not just cases involving aircraft.

Article III, section two of the Constitution declares that "[t]he Judicial Power of the United States shall extend to . . . all cases of admiralty and maritime Jurisdiction." Mr. Justice Story early suggested that this constitutional grant be liberally construed to encompass all that was included in the laws of ancient France, England and the other maritime nations of Europe and the Mediterranean. During these early times, the sole test for both contract and tort jurisdiction in England as well as on the continent was the maritime nature of the dispute. Exercising the power given to it in the "necessary and proper" clause of article I, section eight, congress implemented the Constitution by passage of the statutory grant of jurisdiction to the federal courts. Although seemingly phrased in as broad a language as its constitutional counterpart, the statutory grant has required specific legislative action to extend the admiralty jurisdiction of the federal courts to the outer boundaries of the constitutional grant. Thus, the constitutional provision can be viewed as designating the extent to which admiralty jurisdiction potentially could be exercised by the federal courts, while the statutory grant, in conjunction with other special legislative acts, gives rise to the present legislative determination, as interpreted by the courts, regarding that which should be so exercised. While outer perimeters of the statutory grant are limited to the outer boundaries of the constitutional concept, the spheres of jurisdiction created by the two grants need not necessarily be coterminous.

The only test for admiralty tort jurisdiction required by the Constitution is a maritime nexus. As discussed above, the constitutional concept of admiralty and maritime jurisdiction is derived from the ancient French and English admiralty courts whose only criterion for both contract and tort jurisdiction was the maritime nature of the dispute. If this was the test for these courts, it follows that it is also the appropriate constitutional test. The soundness of this

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17 25 HARV. L. REV. 381 (1912).
19 77 HARV. L. REV. 545 (1964).
20 See note 14 supra.
logic is supported by recognition of the fact that various congres-
sional acts have extended admiralty cognizance to situations that
lacked any maritime locality, but did possess sufficient connection
to the subject matter with which admiralty was concerned. Despite
the lack of a maritime locality, these acts have all been accepted
by the courts as constitutional. The Extension of Admiralty Juris-
diction Act, for example, expands admiralty jurisdiction to cover
torts caused by a vessel although consumated on shore. Under these
circumstances, no marine locality is present for the tort “occurs”
on land. Notwithstanding the absence of a maritime locality, the
statute declares that connection with the vessel constitutes a suffi-
cient maritime nexus to invoke admiralty jurisdiction. If the con-
stitutional test contained a locality requirement, the Extension of
Admiralty Jurisdiction Act would be struck down as including
within admiralty torts outside the constitutional scope. The courts
however, have consistently upheld the constitutionality of the Act.

Under European admiralty law, amphibious torts were actionable
in the maritime courts. American courts have viewed the Constitu-
tion as allowing for the same. Locality then comprises no part of
the constitutional test.

If maritime “nexus only” represents the constitutional test, then
any statutory test, at the very least, must contain nexus also. The
latter cannot allow into admiralty an action that cannot pass con-

41 46 U.S.C. § 740 (1971) provides:
The admiralty and maritime jurisdiction of the United States shall
extend to and include all cases of damage or injury, to a person or
property, caused by a vessel on navigable water, notwithstanding
that such damage or injury be done or consumated on land.

42 The Plymouth, 70 U.S. (3 Wall) 20, 35 (1866), accord, Smith & Son v.
Taylor, 276 U.S. 179 (1928), Minnie v. Port Huron Terminal Co., 295 U.S. 647
(1935). Although the Extension of Admiralty Jurisdiction Act overrules the re-
sult in The Plymouth, it has no effect on the latter's internal logic.

43 United States v. Matson Nav. Co., 201 F.2d 610, 614-16 (9th Cir. 1953);
American Bridge Co. v. The Gloria O, 98 F. Supp. 71 (E.D.N.Y. 1951); Fematt

44 201 F.2d at 615.

45 As the Court points out other legislative acts have been construed to re-
quire a relationship to maritime service, commerce or navigation. 409 U.S. at
259-60. See O'Donnell v. Great Lakes Dredge and Dock Company, 318 U.S. 36
(1943) applying Jones Act to seamen injured on land by drawing analogy to
similar treatment of the concept of maintenance and cure; Gutierrez v. Waterman
Steamship Corp., 373 U.S. 206 (1963) extending the doctrine of unseaworthiness
to a seaman or longshoreman to recover for injuries sustained wholly on land if
caused by defects in a ship or the ship's gear; it may be argued contra that these
cases were more concerned with the status of seamen than with tort jurisdiction.
stitutional muster. The statutory test, however, may require more by incorporating additional limiting criteria and exclude some actions that would otherwise pass the broad constitutional test. Locality is a limitation of this kind. When used in the statutory context, the maritime locality test serves to restrict the grant of jurisdiction that could potentially be given, not to expand it to action not within the constitutional concept. A court that theorized in terms of "locality only" would have to apply a maritime connection criterion sub silentio in order to conform to the Constitution.

In establishing a "locality plus" test in Executive Jet, the Supreme Court is not constructing a constitutional standard. Rather, it is announcing a test designed to identify that which the legislature thought should be entertained within admiralty today, not what constitutionally could be. Waging a constitutional argument against the application of admiralty jurisdiction to an aircraft crashing on navigable waters would be very difficult given the accepted constitutional of the Death of the High Seas Act as applied to aerial mishaps occurring beyond territorial waters. The mechanism employed in determining what is within this statutory grant, is the "locality plus" test.

II. THE RISE AND FALL OF "LOCALITY ONLY"

In Executive Jet, the Supreme Court did not rely on overt constitutional analysis in reaching its decision. Instead, it merely concluded that no definitive test had been enunciated by the High Court, and thus, it was free to devise an appropriate test. In making this decision, an important consideration of the Court was an examination of previous case law.

The early American decisions, though looking to the English law for guidance, did not feel constrained to always follow it. As England developed into a great seapower, the authority of its admiralty courts increased correspondingly. The expansion of this influence

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Comment, 64 Colum. L. Rev. 1085, 1091 (1964); this theory is discussed infra p. 11.


heightened the jealousy of the common law courts for their brethren in admiralty. The common law courts, after protracted strife and struggle, managed to place restrictions on the admiralty's scope of operations. Geographic in nature, these limitations restricted admiralty jurisdiction to disputes occurring upon the high seas. The United States, however, not to be constricted by the peculiarities of the English experience, turned to the principles then in practice in the civil law countries. In *DeLovio v. Boit*, Mr. Justice Story rejected the application of English jurisdictional limitations in holding that contracts of maritime insurance, although entered into on land, were within admiralty jurisdiction. In referring to the constitutional grant of jurisdiction to admiralty courts he remarked:

If we examine the etymology, or received use of the words “admiralty” and “maritime jurisdiction,” we shall find, that they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.

As for the statutory grant of jurisdiction, he declared:

> The delegation of cognizance of “all civil cases of admiralty and maritime jurisdiction” to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts . . . which relate to the navigation, business or commerce of the sea.

In Story's view, American admiralty was to be a subject matter jurisdiction, rather than a geographical one when maritime contracts were at issue. This position is consonant with the concept that the purpose of admiralty law is to regulate and achieve uniformity in the area of maritime commerce. Tort jurisdiction may

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30 See generally, GILMORE & BLACK. THE LAW OF ADMIRALTY, ch.1 (1957) [hereinafter cited as GILMORE & BLACK].
31 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815).
32 *Id.* at 441.
33 *Id.* at 444 (emphasis added).
34 A contra interpretation is that this subject matter concept only extended to contracts, not to torts. Story's language is susceptible to this interpretation. Indeed some early writers subscribed to the belief that the theory of “locality plus” originated from an erroneous application of the contract test to tort cases. 16 HARV. L. REV. (1903).
be further bounded by locality, but this predicate may be construed as a limitation on the subject matter, not a substitute for it.

The Supreme Court adopted the English geographical limitation on tort jurisdiction in *The Plymouth*.\(^6\) Owing to the negligence of those in charge of the steamship *Falcon*, the vessel caught fire. The flames leaping from the ship to the adjoining wharf, set the pier and its warehouses on fire. As a consequence, stores in the houses were destroyed. The Court held that no jurisdiction lay in admiralty since the entire damage occurred on land:

> Dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond the high-water mark. . . .\(^7\) The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.\(^8\)

Focusing myopically on this last sentence, most courts interpreted *The Plymouth* as firmly establishing the "locality only" test. More recently, however, *McGuire v. City of New York* advocated that a closer reading of *The Plymouth* would indicate that locality served as a limitation on the exercised jurisdiction, not as the sole criterion upon which to expand jurisdiction to all torts consumated on navigable waters irrespective of their connection with traditional maritime activity.\(^9\) Indeed, the Court in *Executive Jet* agreed that "despite the broad language of cases like *The Plymouth*, supra, the fact is that this Court has never emphatically held that a maritime locality is the sole test of admiralty tort jurisdiction."\(^10\)

To interpret *The Plymouth* or *DeLovio* as calling for locality as the sole factor and so to apply them did not spawn unsavory results in the great majority of instances. When a "locality only" test was applied to contract cases, its inappropriateness was easily discernable; when applied to tort cases, however, the practical results did not prove unsatisfactory. There seemed no reason to re-examine the issue. As the Supreme Court in *Executive Set* recognized, in the

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\(^6\) 70 U.S. (3 Wall) 20 (1866).
\(^7\) *Id.* at 33.
\(^8\) *Id.* at 36.
\(^9\) 192 F. Supp. at 869.
\(^10\) 409 U.S. at 258.
early era it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a vessel or traditional maritime commercial activity. Because a maritime link was always present, the courts tended to overlook its significance; because it was always present, this neglect could pass unnoticed. While the majority of courts did speak exclusively in terms of locality, most of the cases adjudicated through application of this test would also have satisfied a "locality plus" requirement. Thus, though not often verbalized, maritime nexus appears to have been a condition sub silentio.

While the application of "locality only" to the traditional types of maritime torts may have produced acceptable results, this was not the case when it was applied to borderline marine situations. In The Blackheath,\(^4^1\) it was held that admiralty had jurisdiction of a libel in rem against a vessel for damages caused by its negligently running into a beacon in a channel. Though the beacon was attached to the ocean bottom, the court in the Blackheath looked to a maritime nexus to bring the action within the cognizance of admiralty, branding the beacon an aid to navigation. The Plymouth was distinguished on the grounds that there was "nothing maritime in the nature of the tort for which the vessel was attached. The fire lacked a maritime flavor."\(^4^2\) In the subsequent decisions involving aids to navigation attached to the land, the courts looked beyond the mere location of the object and instead sought to determine its purpose.\(^4^3\) Courts were forced to begin to question the exclusivity of locality.

Cases involving injured swimmers, produced full scale abandonment of "locality only" by many courts. Thus, in McGuire v. City of New York when a bather struck a submerged piling at a public

\(^{4^1}\) Id. at 254.  
\(^{4^2}\) 192 F. Supp. at 868 n.3; 64 COLUM. L. REV. at 1088.  
\(^{4^3}\) 195 U.S. 361 (1904).  
\(^{4^4}\) Id. at 367.  
\(^{4^5}\) 23 WASH. & LEE L. REV. 345, 349 (1966). This groping for the purpose of the object is exemplified by the cases in which submarine cables used for communication were held not to be a structure on the land or affixed thereto and thus within admiralty jurisdiction, Postal Telegraph Cable Co. v. P. Sanford Ross, Inc., 221 F. 105 (E.D.N.Y. 1915), while cables deployed solely to carry electric current were considered land structures and thus without admiralty cognizance Nippon Yusen Kabushiki Kaisha v. Great Western Power Co., 17 F.2d 239 (9th Cir. 1927).
beach, the district court ruled that the fact that a tort occurred on navigable waters was merely a prima facie test of admiralty jurisdiction. Accordingly in *Chapman v. City of Grosse Point Farms* the Sixth Circuit recognized:

A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters, a fact which in and of itself, in light of the historic justification for federal admiralty jurisdiction is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts.

The Court in *Executive Jet* was aware that the courts applying the maritime nexus factor obtained more rational results while the courts that blindly applied "locality only" to similar situations achieved absurd results justified only by tortured logic. In *Davis v. City of Jacksonville Beach, Fla.*, for example, the district court felt constrained to defend its position by classifying a surfboard as possessing a potential to interfere with trade or commerce. This suspect reasoning was abandoned in *Rodrique v. Aetna Cas. & Surety Co.* In this case, the Supreme Court refused to hold the Death on the High Seas Act applicable to accidents arising on drilling platforms in the Gulf of Mexico because the accidents bore no relation to the traditional concerns of admiralty.

The Court in *Executive Jet* recognized that aircraft cases were border line situations in which application of "locality only" produced unsatisfactory results. As in the cases involving swimmers, a maritime connection could not always be assumed to be present in aviation tort actions. Nevertheless, courts had traditionally ignored the nexus aspect of the issue and applied admiralty law to aviation torts occurring on or over navigable waters. Thus, not only were deaths caused by crashes upon the high seas cognizable under the

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46 192 F. Supp. at 870.
47 385 F.2d 962 (6th Cir. 1967). A swimmer was injured when he dove from a pier into eighteen inches of water.
48 Id. at 966.
49 Davis v. City of Jacksonville Beach, Fla., 251 F. Supp. 327 (M.D. Fla. 1965) (injury to a swimmer by a surfboard).
51 Id. at 360.
Death on the High Seas Act, but so too were actions for personal injuries arising out of these crashes. In Weinstein v. Eastern Airlines, Inc., when a jetliner crashed into Boston Harbor shortly after takeoff, claims for wrongful death were granted admiralty jurisdiction while those involving breach of contract and warranty were not. In reaching that decision the Court of Appeals for the Third Circuit rejected the concept of “locality plus”, and instead, relied exclusively on locality. However justified it argued its position to be, the court in Weinstein was not so confident that it could resist assuring the parties that, in its opinion, “locality plus” was satisfied also.

In handing down its decision in Executive Jet, the Supreme Court overruled Weinstein in both reasoning and result. Unlike a ship, an airplane is not confined to the boundaries of the sea; its crashing into the ocean is wholly fortuitous. The requirement that the wrong show a relationship to traditional maritime activity serves as a protection against that fortuity becoming operative.

The argument that the holding of “locality plus” in Executive Jet should be restricted in its application to aviation torts must be rebutted. Quite apart from the constitutional analysis offered earlier, this interpretation of Executive Jet is far too parochial. That this decision represents the first time the Supreme Court has chosen to explicitly state what is the test for admiralty tort jurisdiction adds clout to the effect the ruling will have. The context in which it necessarily had to work was an aviation tort. The issue was likely to arrive at the Supreme Court within the confines of a “borderline” case that involved airplanes or swimmers because, as we have seen, more traditional maritime situations would have been resolved satisfactorily, their maritime nexus being inherent in the instrumentality involved. The Court’s protracted discussion of the development of admiralty tort jurisdiction, however, and its approval of the tests laid out in McGuire and Chapman would seem to indicate that the Court was resolving an issue whose impact

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55 Id. at 763.
went far beyond airplane crashes in territorial waters. The Court in *Executive Jet* has decreed that that which was a condition *sub silentio* in traditional maritime decisions should be dormant no longer and that the maritime nexus should henceforth be a condition *expressio*. "It is far more consistent with the history and purpose of admiralty to require . . . that the wrong bear a significant relationship to traditional maritime activity."56

III. SUFFICIENT NEXUS

After establishing "locality plus" as the applicable test, the Supreme Court in *Executive Jet* concluded that a land-based aircraft on an intracontinental flight did not reflect a significant enough relationship to traditional maritime activity to satisfy the nexus requirement. The Court, however, refused to define what would constitute a sufficient nexus. It did hint that a transoceanic flight would comprise an ample nexus since in this situation the aircraft would be "performing a function traditionally performed by a waterborne vessel."57 The problem with the validity of this concept is that the function is being performed in an entirely different medium—the atmosphere above the earth. The only time an airplane comes into contact with the sea is when it fails to function properly. The characteristics of this medium and of the "ships" that operate in it bear little resemblance to those concerns admiralty law was designed to remedy. The above mentioned phrase, however, in addition to the requirement that the wrong should "bear a significant relationship to traditional maritime activity"58 are the only guidelines given by the Court.59 Applying these criteria to the cases like *Hornsby v. The Fishmeal Co.*,60 where two planes serving as spotters for fishing vessels collided within a state's territorial limits, it would appear admiralty jurisdiction may be retained in some aviation-maritime situations. In *Hornsby*, the pilots were performing duties ordinarily performed by men in water vessels and were actively engaged in the traditional marine business of fishing. Similarly, the derigible

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56 409 U.S. at 268.
57 Id. at 271.
58 Id. at 268.
59 It has been suggested that contract standards could be used. 44 Tul. L. Rev. 166, 172 (1969).
60 431 F.2d 865 (5th Cir. 1970).
involved in *Montgomery v. Goodyear Tire & Rubber Co.* would remain within the confines of admiralty because it was to be used primarily over water.

The precise effect that *Executive Jet* will have on future plaintiffs asserting admiralty jurisdiction will depend largely on what future courts will require as a significant maritime nexus. One class of plaintiffs that will have to face this problem will be those involved in water recreation accidents. Given the Supreme Court's emphasis on traditional maritime activity and commerce, the occurrence on water of a tort, even if involving a "vessel," may not be enough to invoke admiralty jurisdiction.

In the past, a water skier, surfer or other water sport enthusiast, if he received an injury on navigable waters, was in a relatively strong position to claim admiralty jurisdiction. As recently as in *King v. Testerman*, when a water skier was injured, the district court reluctantly felt compelled to grant admiralty jurisdiction:

> The concurrence of the use of a boat in connection with the accident and the fact that it occurred on navigable waters constrains the Court to the belief that admiralty jurisdiction is thereby established. But the matter is by no means free from doubt.

The result is even more doubtful today. In *Davis v. City of Jacksonville Beach, Florida* a swimmer sustained injuries when struck by a surfboard. Although ruling that admiralty could entertain the suit because of the locality of the tort, the district court believed the maritime nexus requirement would also be satisfied since the surfboard could be analogized to a raft or a canoe. Neither a twenty-three foot Owens Craft Cruiser nor a surfboard bear a relationship to the traditional maritime activity admiralty law was created to regulate. Their sole *raison d'être* is to afford recreational enjoyment to their users. The similarities between pleasure craft on navigable waters and those on waters not so designated are greater than the similarities between pleasure craft on navigable waters and commercial vessels. Yet, in the absence of a requirement of a relationship to traditional commercial maritime activity, pleasure craft used on navigable water will be subject to ad-

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63 *Id.* at 336.
64 *See* note 49 *supra.*
miralty law, while pleasure craft on nonnavigable water are governed by different substantive rules. Under *Executive Jet* this relationship is required and recreation cases can be expected to be thrown back into the state courts where they belong. It often has been erroneously contended that "nothing is more maritime than the Sea." This statement fails to recognize the basic fact that the primary concern of admiralty is not the sea but the uniform regulation of seagoing commerce. Our federal courts are burdened enough without having to hear the case of every disgruntled swimmer, skier or Sunday skipper.

**IV. AIRPLANES AND ADMIRALTY**

The Supreme Court in *Executive Jet* allowed for the possibility that aircraft engaged in transoceanic flights would be within admiralty jurisdiction largely because it feared that choice of law and forum problems and international legal difficulties involving multination conventions and treaties would arise if these types of flights were withdrawn from admiralty cognizance. While not unfounded, these considerations should not stand in the way of excluding all aircraft from admiralty jurisdiction irrespective of any functional similarity to ocean carriers. Even if we accept the argument that aircraft could be brought within admiralty tort jurisdiction, the better view is that they should not.

Eliminating intracontinental flights from the grasp of admiralty

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66 Should a pleasure craft interfere with maritime commerce, this interference could form the basis of a sufficient nexus on which to ground admiralty jurisdiction. The inequities that exist when pleasure craft cases are allowed into admiralty are illustrated by the situation of negligent operation of a speedboat resulting in injuries totaling hundreds of thousands of dollars. Through the application of the Limitation on Liability Act (46 U.S.C. §§ 181-89 (1972)), the negligent owner-operator would be held accountable only for the amount representing the value of his "vessel" at the end of its journey, perhaps as little as a couple of hundred dollars. The purpose of the Act, to encourage investment in American ship building, is inapplicable to this owner.

67 See, e.g., Pure Oil Co. v. Snipes, 293 F.2d 60, 65 n.6 (5th Cir. 1961); 316 F.2d at 762.


69 409 U.S. at 272.

70 The choice of law problems are not formidable. In those jurisdictions adopting the contacts approach, the law of the state or nations with the most significant relationship to the occurrence will apply; in those jurisdictions that retain the *lex loci* approach, the substantive laws of admiralty would apply.
will not eradicate fortuity. Because aircraft are not restricted to travel over only land or water, even if "locality plus" is applied, the existence of airplanes will bring chance into play. Assuming that a transoceanic flight does possess a sufficient maritime nexus, if that aircraft plunges into Boston Harbor shortly after take off, an action will be in admiralty for death and injuries resulting therefrom. If that same flight, however, manages to catch the rocks of Winthrop shore and is thus prevented from reaching the water's edge, plaintiffs must turn to the common law courts for remedies and jurisdiction. This is the very fortuity that helped move the Supreme Court in *Executive Jet* to action. As long as locality forms any part of the jurisdictional test, fortuity will remain.

Another situation in which fortuity runs rampant under the principles laid down in *Executive Jet* is when a landbased aircraft on a flight between points within the continental United States crashes outside the territorial limits. According to the Supreme Court, the Death on the High Seas Act then becomes applicable. If the victim dies, his heirs may invoke admiralty; if he lives, the plaintiff has recourse only to the common law courts. Unification is needed. Not one that is engineered to satisfy the needs and idiosyncracies of the commercial maritime industry, but one formulated with the requirements of aviation in mind.

While parties to aviation tort actions that remain in admiralty are accorded automatic access to the federal courts and the procedural advantages of admiralty jurisdiction, much of the substantive maritime law has not been applied to aircraft. Thus, though a downed plane has been held subject to a maritime lien for salvage, aircraft are not generally subject to maritime liens.

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19 Federal court jurisdiction without the need for diversity dollar amount, or independent basis of federal jurisdiction; more liberal venue requirements (7A *Moore* § 66); depositions de bene esse (*Moore*, § 58), broader rights of impleader (*Fed. R. Civ. P. 14*); the savings to sailors clause (28 U.S.C. § 1333).

20 This conclusion is not clear, however, when a seaplane crashed into navigable waters, it was held no maritime lien for salvage attached. Foss v. Crawford Bros. No. 2, 215 F. 269 (W.D. Wash. 1914). Yet, when a seaplane buzzed a ship and then landed in the water it was ruled that there was a salvage lien. Lambros Seaplane Base v. The Batory, 215 F.2d 228 (2d Cir. 1954). In this latter case, however, the salvors were denied award on other grounds.

It has been argued that salvage liens should attach because in this situation the fallen aircraft is in the same position as a ship—either floating helplessly or sunk. In either instance, its capacity for flight no longer exists. Crenshaw, *Airplanes in the Admiralty Jurisdiction: A Short History*, 18 S.C.L. Rev. 572, 574
nor the maritime Limitation of Liability Act. Furthermore, airplanes are exempt from the maritime rules of the road under the Federal Aviation Act and air crews are not deemed seamen within the scope of the Jones Act. This recognition by the courts that application of substantive admiralty rules to aircraft is inapposite serves as an admission that admiralty was not created to cope with the kinds of commercial problems that accompany the aviation industry.

The risks and routine encountered by passengers on transoceanic and intracontinental flights are very similar if not identical. No corresponding similarities are shared by a transoceanic flyer and his counterpart on an oceanliner. As admiralty law has developed to provide a set of rules and principles applicable to the particular problems of maritime commerce and navigation, so too should a body of law amenable to the idiosyncracies of the commercial aviation industry be developed. In a piecemeal fashion, Congress has recognized the special status and problems of airplanes and has enacted considerable legislation directed at this area. Congress should now complete its task and develop a complete set of laws in harmony with the aviation industry, a body of law the applicability of which will not be contingent upon the ultimate destination of the aircraft nor upon the composition of the terrain over which it happens to be flying.

V. CONCLUSION

Executive Jet represents an abrupt overruling of the holding in Weinstein v. Eastern Airlines, Inc. that crashes of land based aircraft on intracontinental flights are cognizable in admiralty. More-

over, it has at last established a definitive test for all admiralty tort jurisdiction. As courts cited Weinstein for the broad proposition that “locality only” determined admiralty jurisdiction, so now, courts will recognize Executive Jet as firmly establishing “locality plus nexus” as the appropriate test for all maritime tort situations. The Supreme Court expended much effort in an exhaustive discussion of the background and development of admiralty tort jurisdiction and applauded the use of the “locality plus nexus” test by lower courts in differing fact situations. While the High Court was working within a factual framework involving aircraft, it did not restrict itself to aviation case precedents in arriving at its decision. Similarly, application of “locality plus nexus” as the test for admiralty tort jurisdiction is not to be confined to aircraft accident cases. The basic soundness of the Supreme Court's holding is supported by both constitutional analysis of the underlying grants of jurisdiction and a recognition that maritime nexus has always been a condition sub silentio to invoking that jurisdiction.

The precise impact that Executive Jet will have on admiralty will be determined to the greatest extent by what courts will interpret as a sufficient maritime nexus. While the Supreme Court failed to provide adequate positive guidelines, it still appears that recreational mishaps occurring on navigable waters do not possess the requisite relationship to traditional maritime activity to ground admiralty jurisdiction. Adjudication of these cases will be left to the state courts. This outcome is consonant with the purpose of admiralty jurisdiction to afford a forum and a uniform set of substantive laws to those parties engaged in traditional commercial maritime activity. This result is also an acknowledgment of that principle which Justice Story recognized early in the development of this nation's concepts of maritime law—admiralty was created to serve as a subject matter jurisdiction, not as a geographical one. While geography may be a limitation on the exercise of that jurisdiction, it is not to be the conclusive sine qua non to its evocation.

Loring A. Cook III

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9 See, e.g., 251 F. Supp. at 328.