NOTES

Admiralty Jurisdiction—The Airplane Crash—A Further Exception to the Strict Locality Rule

In *Executive Jet Aviation, Inc. v. City of Cleveland*,[1] the Supreme Court held that the mere occurrence or location of an alleged wrong on or over navigable waters is not of itself sufficient to bring an aircraft crash within the federal admiralty jurisdiction, but that the wrong must bear a significant relationship to traditional maritime activity. On July 28, 1968, a Falcon Mystere jet aircraft on an interstate flight plan struck several hundred sea gulls immediately after lifting off the runway of Burke Lakefront Airport in Cleveland, Ohio. Crippled by a loss of power, the plane descended and struck the airport fence before finally sinking into the navigable waters of Lake Erie. Alleging a total loss of the aircraft, the owners filed suit in admiralty against the city of Cleveland and airport personnel. The district court dismissed the action on the ground that it did not fall within the court's admiralty jurisdiction. On appeal,[2] the Court of Appeals for the Sixth Circuit affirmed, finding that the alleged negligence in authorizing takeoff occurred on land, even though the aircraft fell into navigable waters, and constituted no maritime tort cognizable in admiralty. After granting certiorari, the Supreme Court in a unanimous decision affirmed, however, without the use of the strict locality test used by the court of appeals.

The United States Constitution provides that "[t]he judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ."[3] The indefiniteness in the clause "all cases of admiralty and maritime jurisdiction" has caused much difficulty in determining the precise scope of the district courts' admiralty jurisdiction.[4] The controlling purpose of creating a separate admiralty jurisdiction is the national concern for the business of navigation and shipping, and the need for uniformity in the control and regulation of the shipping industry.[5]

1. 409 U.S. 249 (1972).

2. 448 F.2d 151 (6th Cir. 1971).

3. U.S. CONST. art. III, §2. In implementing this constitutional plan Congress provided the federal district courts with "exclusive" original jurisdiction over "all civil cases of admiralty and maritime jurisdiction." Factors such as the domicile or citizenship of the parties, and the amount in controversy are not important in determining whether admiralty jurisdiction exists. Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833) (domicile); THE ROBERT W. PARSONS, 191 U.S. 17 (1903) (amount in controversy).

4. *See* Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 263 (1950).

5. *Id.* at 261. The purpose behind a separate admiralty jurisdiction in the federal courts "is a federal interest that can best be implemented by . . . dealing with the major concerns

The earliest decision to consider the problem created by the vague constitutional grant of admiralty and maritime jurisdiction was *De Lovio v. Boit*,[6] where it was declared that the jurisdiction encompasses 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."[7] The court's reasoning in *De Lovio* secured the supremacy of the general law of admiralty over the substantive law of the states by delineating its geographic and subject matter boundaries.

As emphasized by *De Lovio* the basis in the United States for admiralty jurisdiction over contract suits has been dependent entirely on the maritime nature of the subject matter,[8] and by ascertaining the contract's connection with the transaction or navigation of a ship.[9] In contrast with the contract cases, the traditional criterion for determining whether a tort is within the scope of the admiralty jurisdiction is whether the tort involved took place upon navigable waters.[10] The Supreme Court's decisions differ as to whether this locality is the place where the negligent act was first committed[11] or where the substance and consummation occurred resulting in damage.[12]

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of the shipping industry. . . ." *See also* 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY §10, at 14 (6th ed. 1940); G. H. ROBINSON, HANDBOOK OF ADMIRALTY LAW 2 (1939); Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQUESNE L. REV. 1, 42 (1968).

6. 7 F. Cas. 418, (No. 3776) (C.C.D. Mass. 1815) (action upon an insurance policy, alleging it to be a maritime contract). Subsequently, decisions of the Supreme Court adhered to this reasoning in Waring v. Clarke, 46 U.S. (5 How.) 41 (1847); Martin v. West, 222 U.S. 191 (1911).

7. 7 F. Cas. at 444. At the time of *De Lovio* the sea was limited to the tidewaters. THE STEAMBOAT THOMAS JEFFERSON, 23 U.S. (10 Wheat.) 428 (1825). However, this was later expanded to cover all navigable waters. THE PROPELLER GENESSE CHIEF v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). The Court reasoned that admiralty was "made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide." *Id.* at 457.

8. Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870); State Indus. Comm. v. Nordenholt Corp., 259 U.S. 263 (1922); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); Kossick v. United States Fruit Co., 365 U.S. 731 (1961).

9. Moore and Pelaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. OF AIR LAW & COMMERCE 3, 5 (1967).

10. THE PLYMOUTH, 70 U.S. (3 Wall.) 20 (1865); Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d. Cir. 1963); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965).

11. *See, e.g.*, T. Smith Sons, Inc. v. Taylor, 276 U.S. 179 (1928) which denied admiralty jurisdiction to a longshoreman who was knocked from a pier into the water and THE ADMIRAL PEOPLES, 295 U.S. 649 (1935) where the Court found admiralty jurisdiction when a passenger was injured by falling from a gangplank while disembarking.

12. *See* THE PLYMOUTH, 70 U.S. (3 Wall.) at 20, where a vessel anchored near a wharf caught fire resulting in damage to several warehouses nearby. The Court denied admiralty jurisdiction because the "substance and consummation of the injury" was on land. In Johnson v. Chicago & Pac. Elevator Co., 119 U.S. 388 (1886), a jib boom of a schooner struck and damaged a warehouse, causing goods to be lost in the navigable river. Admiralty jurisdiction was refused because the tort was found to have occurred on land.

Serious criticism arose against the mechanical "locality" approach to admiralty tort jurisdiction,[13] and although the Supreme Court recognized the criticism, it failed to give a definitive position. In *Atlantic Transport Co. of West Virginia v. Imbrovek*,[14] a stevedore brought suit for injuries sustained on board a vessel; the defendant argued that there was no maritime relationship present, and the federal courts were therefore without jurisdiction. The Court disagreed and affirmed a finding of admiralty jurisdiction but dodged the nexus argument: "*If* more is required than the locality of the wrong in order to give the court jurisdiction the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient."[15] This failure of the Court to take a distinctive stand on the true test of admiralty tort jurisdiction in *Imbrovek* later proved to be confusing to future decisions.[16]

While the Supreme Court refused to concretely treat the locality test as exclusive, some district courts refined this test for tort jurisdiction in admiralty by arguing for a "locality plus test."[17] Although continuing to maintain the need for a maritime location, these decisions attempted to limit the much broader mechanistic idea by requiring a nexus or "relationship between the alleged wrong and maritime service, navigation or commerce on navigable waters. . . ."[18] These decisions[19] gave a new force to the

13. 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY 173 (1850), as cited in *Pelaez, supra* note 5, at 7-8. The skepticism is portrayed in Judge Benedict's "famous doubt":

> It may . . . be doubted whether the civil jurisdiction in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which . . . in cases of contract, applies.

14. 234 U.S. 52 (1914).

15. *Id.* at 62 (emphasis added).

16. *See* THE POZNAN, 276 F. 418, 433 (S.D.N.Y. 1921). In looking for a test to determine whether a tort was to be labeled maritime, the court, after first stating the historic premise that ordinarily the locus of the tort governs, cited *Imbrovek* for the proposition that perhaps not every tort committed at sea was within the jurisdiction of an admiralty court. This led the court to assume that "the injury must be maritime in its character as much as though the case sounded in contract." In Sidney Blumenthal & Co. v. United States, 30 F.2d 274, 279 (2d Cir. 1929) the Second Circuit found no help in referring to the *Imbrovek* opinion when it stated that there might be torts committed on the water of which the admiralty would not take cognizance; Compare these cases with Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120, 121 (S.D. Fla. 1966) where the court cited *Imbrovek* for the strict locality rule.

17. McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961). The court defined its locality plus concept: "The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. A maritime wrong generally has been concluded to be one which in some way is involved with shipping and commerce." *Id.* at 868-69. Following the *McGuire* reasoning is Hastings v. Mann, 226 F. Supp. 962, 965 (E.D.N.C. 1964), where the court refused admiralty jurisdiction to plaintiff who sustained injuries while standing on a boat ramp. The tort was found not to have arisen out of navigation.

18. Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967).

19. The decisions calling for a locality plus theory were clearly part of a minority. *See* cases decided subsequent to *McGuire, supra* note 17, Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 763 (3d Cir. 1963), which called for strict locality approach in an airplane crash;

movement against the strict locality rule,[20] the effect of which was not only to show dissatisfaction with the strict locality test, but also to give the courts a different point of view in approaching the jurisdiction problem.

Aviation mishaps occurring on or over the navigable waters and high seas present a slightly different problem.[21] Because an aircraft is not bound by land or sea it is difficult to define the origin of the tort or even to predict the locus of the crash. The Death on the High Seas Act[22] while not enacted expressly for aircraft cases was extended by the courts to apply to accidents beyond state territorial waters both on the basis of the locality test[23] and statutory interpretation of the act.[24] In *Weinstein v. Eastern Airlines, Inc.*,[25] the Third Circuit was faced with a case where an aircraft crashed into navigable waters within state territorial limits shortly after takeoff. Employing the consummation concept of the strict locality rule and the Death on the High Seas Act[26] the court held that the negligent acts resulting in the crash were committed on land where the plane came into contact

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Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120, 121 (S.D. Fla. 1966), where the court questioned the locality plus concept of *McGuire*; Wiper v. Great Lakes Eng'r Works, 340 F.2d 727, 730 (6th Cir. 1965), where the court held the traditional test of locality governs in tort cases.

20. In order to bring into the scope of admiralty jurisdiction those torts very closely connected with activities clearly maritime yet not occurring on navigable waters, the courts and legislature had been forced to create exceptions to the strict mechanical concept of locality, *e.g.*, doctrine of maintenance and cure [*see* in this connection, O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943)]; Jones Act, 46 U.S.C. §688 (1970); concept of seaworthiness [*see generally* 7 J. MOORE, FEDERAL PRACTICE ¶.325 (4), at 3575 (2d ed. 1972)]; Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740 (1970).

21. *See* The Crawford Bros. No. 2, 215 F. 269 (W.D. Wash. 1914). A libel in rem for repairs was brought against an airplane which had crashed into navigable waters. The court concluded that the action lacked admiralty because airplanes "are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime." *Id.* at 271. *Crawford Bros.* was followed by decisions in which the courts restricted admiralty jurisdiction to planes that were afloat on navigable waters. An example is Reinhardt v. Newport Flying Serv. Corp., 133 N.E. 371 (1921), which involved a plaintiff who was injured by a seaplane. In finding admiralty jurisdiction, the court stated: "We think the craft, though new, is subject, while afloat, to the tribunals of the sea." *Id.* at 327.

22. 46 U.S.C. §§761-68 (1970) creates a cause of action for death on the high seas beyond one marine league from shore and provides for exclusive jurisdiction in admiralty courts. This statute was important in filling the void in the common law which provides no remedy for wrongful death. It also provided uniformity to the remedy which had become varied as a result of the different states' wrongful death statutes. See in this regard 7 J. MOORE, FEDERAL PRACTICE ¶.330(2), at 3653 (2d ed. 1972).

23. Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954).

24. D'Aleman v. Pan-American World Airways, 259 F.2d 493 (2d Cir. 1958). The court concluded that the statutory words "on the high seas" could be capable of extension to include "under" and "over" the high seas; in Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963), the court reasoned that if a tort claim arising out of an aircraft accident beyond one league from shore is within the maritime jurisdiction of the court, then a crash within that limit must be within it as well.

25. 316 F.2d 758 (3d Cir. 1963).

26. *Id.* at 765.

with numerous birds. Nevertheless the court held that "if the disastrous effects of failure to properly inspect or maintain the aircraft occurred on navigable waters . . . the tort claims must be deemed to be within the admiralty jurisdiction."[27] The court bolstered its argument for granting admiralty jurisdiction by analogizing the risks facing aircrafts to those of ships.[28] Thereafter, many courts in dealing with airplane crashes followed the strict locality theory of *Weinstein*,[29] while others disapproved of the case and adopted the "locality plus" test.[30]

Because the strict locality theory of admiralty jurisdiction has never proved entirely acceptable either in its application or in its relation to the purposes behind admiralty, the Supreme Court's approach in *Executive Jet Aviation, Inc. v. City of Cleveland*[31] was not an anomaly. The issue presented was whether the strict locality test should be the sole factor for finding admiralty tort jurisdiction. Notwithstanding the *Weinstein* court's reasoning supporting the strict locality test as the exclusive criterion, Justice Stewart, writing for a unanimous Court, concluded:

> [T]he mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters . . . is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.[32]

The Court spoke of the traditional locality test as a workable criterion for "traditional types of maritime torts,"[33] but one which had never been employed as the sole test.[34] Referring to judicial and legislative exceptions and extensions of admiralty jurisdiction which are predicated on the maritime subject matter and not on the locality of the tort,[35] the Court narrowly held that land-based aircraft on flights between points within the conti-

27. *Id.*

28. *Id.* at 763.

29. *See, e.g.*, 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); Rapp v. Eastern Airlines, Inc. 264 F. Supp. 673 (E.D. Pa. 1967). *Cf.* Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971), where the fact that the damage sued for occurred after the aircraft sank in navigable water was set aside by the court: "The alleged negligence . . . took effect on land. The cause of action arose on land and not on navigable water." When compared with the *Weinstein* decision, this holding typifies the confusion in applying the strict locality theory to aircraft, particularly in light of the "first effect" versus "consummation" dichotomy.

30. Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).

31. 409 U.S. 249 (1972).

32. *Id.* at 268.

33. *Id.* at 254.

34. *Id.* at 258.

35. *Id.* at 259.

nental United States are not engaged in an activity which bears a significant enough relationship to bring them within the scope of admiralty.[36] The Court emphasized the need for federal aviation legislation, pointing to its disdain for comparing aircraft and maritime vessels: "If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents . . . adapted to the specific characteristics of air commerce."[37]

Although the Court focused on airplane crashes at sea, the cases which it cited as "perverse and causistic borderline situations" which were examples of "some of the problems with the locality test of maritime tort jurisdiction"[38] were non-aviation in nature.[39] The impact of this dicta could easily be the moving force in determining admiralty jurisdiction in future decisions, since the problems recognized by the Court were concerned with the application of the locality test.

From a jurisdictional standpoint the decision is a strong indication that the states' interests in the navigable waters within their borders and surrounding their coasts will play a larger role in determining federal admiralty competence. The *Executive Jet* Court reasoned: "[T]he Ohio courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeav-

36. *Id.* at 266.

37. *Id.* at 274.

38. *Id.* at 255.

39. *See, e.g.*, Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935); Smith & Son, Inc., 276 U.S. 179 (1928); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (1965).

Recent non-aviation tort decisions have adopted dual approaches to *Executive Jet*, citing the Supreme Court's holding as authority for abolishing the strict locality theory either in all areas of tort or in the limited field of aircraft occurrences. *See, e.g.*, Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973), concerning a wrongful death action against a power company whose power dam's discharge capsized a small boat on navigable waters. The court found no admiralty jurisdiction despite the traditional maritime locality. Basing its decision on *Executive Jet*, the court reasoned that "[w]hen the Supreme Court refused to mechanically apply the locality rule to an aircraft crash . . . it diminished the binding force of the label 'navigable water' and freed the courts to make a wider inquiry into the admiralty jurisdiction problem." *Id.* For a similar approach to *Executive Jet*, see Rubin v. Power Authority of New York, 356 F. Supp. 1169 (W.D.N.Y. 1963), which disallowed admiralty jurisdiction, in a wrongful death action against the operation of a generating plant for the deaths of divers who, while diving in a navigable river, were drawn into the water intakes of defendant's plant. The court noted that while *Executive Jet* involved an airplane accident, the Supreme Court in *Executive Jet* indicated that "use of the so-called locality test to invoke admiralty jurisdiction 'seems almost absurd' in other cases." *Id.* at 1170-71.

Contrary to this broad interpretation of *Executive Jet* is Maryland Dept. of Natural Resources v. Amerada Hess Corp., 356 F. Supp. 975 (D. Md. 1973) involving an action by the state to recover for the pollution of waters of Baltimore Harbor stemming from the rupture of an oil transfer line. Finding admiralty jurisdiction, the court limited its reading of *Executive Jet*: "[T]he Supreme Court did not reject the locality test for jurisdiction in admiralty cases, but merely held it to be insufficient in claims arising from airplane accidents." *Id.* at 976.

ors."[40] The Death on the High Seas Act is phrased specifically in terms of the place of the injury, and the usual lack of state remedies for injuries and death beyond territorial waters renders a federal remedy highly desirable.[41] Although a possible argument for application of admiralty jurisdiction is to promote uniformity of relief, the admiralty courts can entertain suits for wrongful death within territorial waters only when that remedy is given by state statute.[42] In these circumstances admiralty "must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attached."[43] The application of admiralty in cases following the strict locality concept would mean that actions for death and injuries caused by the same airplane crash would be governed by general maritime law for those injured and state law for those killed.[44] *Executive Jet* arguably holds that any transaction or occurrence within state territorial waters which does not have the required nexus is a matter to be treated by state courts, thereby eliminating the need for references to both state and federal laws in the same occurrence.

Contrary to the weight of those decisions suggesting that locality is the sole criterion for tort claims, the Supreme Court's opinion in *Executive Jet* points to a more rational approach to determining admiralty jurisdiction in any case seeking the federal admiralty forum. In theory, if the exercise of admiralty jurisdiction is to fulfill the purpose of its origin, strict locality should lose prominence as the sole test of finding federal jurisdiction. If lines are to be drawn perhaps the locality requirement can remain a useful tool to divide state and federal jurisdictional boundaries. A separate determination, however, should be made to consider whether exercise of jurisdiction is consistent with the policy considerations behind admiralty jurisdiction.

Althoughthe Court in *Executive Jet* did not clearly conclude how courts should determine whether a particular wrong bears a "significant relationship to traditional maritime activities," a logical guideline would be to handle the problem on a case-by-case method, balancing the interests of the federal government in resolving commercial matters against the state's interest of sovereignty and protection of individuals within its legislative and common law jurisdiction.[45]

Several commentators have suggested the adoption of the contract concept of determining maritime jurisdiction.[46] This would be helpful in airplane crashes where the locality of the impact is highly fortuitous. Indeed, the Supreme Court's nexus requirement appears analogous to the mari-

40. 409 U.S. at 273.
41. Note, 77 HARV. L. REV. 545, 546 (1963).
42. THE TUNGUS v. Skovgaard, 358 U.S. 588, 591 (1959).
43. *Id.* at 592.
44. *See* note 41 *supra*, at 546.
45. Peytavin v. Government Employee's Ins. Co., 453 F.2d 1121 (5th Cir. 1972).
46. *See* Pelaez, note 5 *supra*, at 43.

time commerce relationship needed in determining admiralty contract jurisdiction.[47]

Courts would do well to consider any of these policy guidelines in determining whether a tort is within the jurisdiction of admiralty. The solution to the problem lies in flexibility of standards and the constant goal of fulfilling the historical design for a separate subject matter jurisdiction.

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47. *See, e.g.*, Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 766 (3d Cir. 1963). Although finding admiralty jurisdiction for the wrongful death action, the action based on breach of warranties of fitness and airworthiness and the action for breach of the contract to provide safe and airworthy transport were dismissed for lack of admiralty contract jurisdiction. The court noted:

> Admiralty jurisdiction over contracts is dependent upon the subject matter of the contract. . . . It is clear . . . that a contract or warranty relating to . . . a land-based aircraft and a contract of carriage by air between two cities on the United States mainland are not maritime in substance, nor are such contracts and warranties made maritime by virtue of the fact that the aircraft in question flew briefly over navigable waters. . . .