ADMIRALTY JURISDICTION IN THE WAKE OF EXECUTIVE JET

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Recent recognition by the United States Supreme Court that admiralty jurisdiction over tort claims requires something more than that the wrong have occurred on or over navigable waters[1] resolves a question which has become increasingly troublesome to the lower federal courts, as plaintiffs in tort actions arising out of such traditionally non-maritime activities as swimming,[2] water-skiing[3] and flying[4] have sought to invoke the admiralty jurisdiction on the ground that the tort had a maritime locality. But the holding and dictum in *Executive Jet Aviation, Inc. v. City of Cleveland*,[5] which recognized that maritime locality by itself is insufficient to invoke admiralty jurisdiction may well engender more problems than it solves.

For many years the lower federal courts have been sharply divided on the question whether the existence of admiralty jurisdiction over tort cases depends solely upon the location of the tort or whether admiralty jurisdiction exists only if the alleged tort both occurred on navigable waters and was connected in some manner with traditional maritime activity.[6] Proponents of the strict locality test (those who con-

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1. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).

2. *E.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961).

3. King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963).

4. *E.g.*, Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968); Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963); D'Aleman v. Pan Am. World Airways, 259 F.2d 493 (2d Cir. 1958).

5. 409 U.S. 249 (1972).

6. *Compare* Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963); Port of New York Stevedoring Corp. v. Castagna, 280 F. 618, 623 (2d Cir. 1922) *and* Dean v. Chesapeake Bay Ferry Dist., 158 F. Supp.

tend that locality alone is determinative) find impressive support for their view in innumerable dicta dating back to at least 1813[7] when Mr. Justice Story, on circuit, stated that "the jurisdiction of the admiralty is exclusively dependent upon the locality of the act."[8] Proponents of the "locality plus [maritime connection]" test, on the other hand, have been quick to point out that the strict locality test originated as a rule of exclusion—that it was intended to exclude from the admiralty jurisdiction claims arising out of torts not having a maritime locality[9] and was not intended to bring within that jurisdiction torts having a maritime locality but no connection with traditional maritime activity.[10]

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408 (E.D. Va. 1958), *with* Peytavin v. Government Emp. Ins. Co., 453 F.2d 1121 (5th Cir. 1972); Campbell v. H. Hackfield & Co., 125 F. 696 (9th Cir. 1903) *and* McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961).

7. *E.g.*, Victory Carriers, Inc. v. Law, 404 U.S. 202, 205-06 (1971); "The Plymouth," 70 U.S. (3 Wall.) 20, 33, 35-36 (1866); Philadelphia, Wil. & Balt. R.R. v. Philadelphia & Havre de Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859); Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813).

In "The Plymouth," *supra* at 35-36, the Supreme Court stated that:

> The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed on the high seas or other navigable waters. . . .
>
> . . . 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.

This is the language which is most frequently cited as authority for the proposition that locality alone is determinative of admiralty jurisdiction. Since the actual holding in the case was that injuries sustained on land (injuries which do *not* have a maritime locality) are *not* within the admiralty jurisdiction, however, the broad statement quoted above is, of course, dictum.

In Victory Carriers, Inc. v. Law, *supra* at 205 n.2, the Court cited some 23 Supreme Court cases which have reiterated the principle that locality alone determines admiralty jurisdiction in tort cases, but in none of these cases did the Court hold that a maritime locality gives rise to admiralty jurisdiction even if the alleged tort was unrelated to traditional maritime activities. *Victory Carriers* itself held that the claim of a longshoreman who was injured on a pier while transporting ship-bound cargo in a forklift truck was not cognizable in admiralty, which points up the fact that, except where Congress has provided otherwise, a maritime locality is required for admiralty jurisdiction to exist. The case, however, did not even touch upon the question whether maritime locality is sufficient in and of itself to give rise to admiralty jurisdiction in cases which are wholly unrelated to maritime activity.

8. Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813).

9. A tort has a maritime locality if the wrongful act takes effect upon navigable waters. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 254, 266 (1972). The origin of this test traces back to "The Plymouth," 70 U.S. (3 Wall.) 20 (1866), where the Court stated that "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within admiralty jurisdiction." *Id.* at 35. Taken literally, this statement appears to require that the substance and consummation of the wrong *and* injury have occurred on navigable waters, but this requirement consistently has been held to be satisfied in cases in which the consummation of the wrong (*i.e.*, the injury) took place upon navigable waters, without regard to where the wrong originated. *See, e.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Hess v. United States, 259 F.2d 285 (9th Cir. 1958); Smith v. Lampe, 64 F.2d 201 (6th Cir. 1933).

10. *E.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967) (injuries sustained by swimmer as result of diving into shallow waters which city allegedly had failed to post with warning signs are not cognizable in admiralty); Campbell v. H. Hackenfield & Co., 125 F. 696, 700 (9th Cir. 1903) (injury sustained by stevedore while unloading vessel not within admiralty jurisdiction because not connected with the vessel, its owner, its officers or its crew, despite the fact that the injury occurred in the hold of the ship); McGuire v. City of New York, 192 F. Supp. 866, 870-71

Until recently the problem was largely academic. Cases in which the locality test was met were for the most part cases in which a maritime connection was obvious and the question of whether such a connection was *necessary* was rarely, if ever, raised.[11] Cases in which the locality test was not met generally were considered to be outside the admiralty jurisdiction without regard to whether there was a maritime connection.[12] But during the past several decades the problem has become a practical one, as more and more victims of accidents arising out of water-related recreational activities have sought to invoke the admiralty jurisdiction[13] in order to secure the advantages often provided by federal jurisdiction and by application of the general maritime law to personal injury claims.[14] More recently the problem has grown to include cases in

(S.D.N.Y. 1961) (injury sustained by swimmer who struck submerged object while swimming in navigable waters not cognizable in admiralty because no maritime connection); *see* Peytavin v. Government Emp. Ins. Co., 453 F.2d 1121, 1126-27 (5th Cir. 1972) (two-car accident on floating pontoon at Mississippi River ferry landing had maritime locality but admiralty jurisdiction was lacking because neither the parties, the cause of the accident nor the injuries had any substantial connection with maritime activities or interests).

11. One notable exception was Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914), in which the maritime locality of the alleged tort was conceded but the defendant contended that admiralty jurisdiction did not exist because the conduct which gave rise to the lawsuit was not related to maritime activity. The Supreme Court did not reach the question whether such a relationship was necessary, however, for it concluded that the wrong was of a maritime nature and that it therefore was unnecessary to go beyond that and determine whether admiralty jurisdiction would have existed absent such a relationship. *Id.* at 61.

12. There are a limited number of exceptions, however. For example, maritime law always has recognized "the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land." O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41-42 (1943). And by analogy to this right under the general maritime law, the Supreme Court in *O'Donnell* interpreted the Jones Act, 46 U.S.C. § 688 (1971), as giving the seaman a right of action for injuries sustained on land as well as for those sustained at sea. 318 U.S. at 42-43. Furthermore, since 1948, when Congress passed the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1971), the general admiralty jurisdiction statute has expressly provided that the admiralty jurisdiction extends to cases arising out of injuries inflicted by vessels on navigable waters without regard to where the injury occurred. Although the purpose of the Act was stated to be to extend admiralty jurisdiction to cases in which a vessel on navigable waters caused damage to persons or property on land, reports from both the House and Senate indicate that Congress took the view that the Act merely "directs the court to exercise the admiralty and maritime jurisdiction of the United States already conferred upon [it] . . . ." S. REP. No. 1593, 80th Cong., 2d Sess. 2 (1948), *quoting from* H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948). In other words, the statute's purpose was to negate the Court's earlier restrictive interpretation of the jurisdictional statute in cases such as "The Plymouth," 70 U.S. (3 Wall.) 20 (1866), which had held that injuries on land inflicted by a vessel on navigable waters are not cognizable in admiralty.

13. *E.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967) (swimmer); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (swimmer); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (water skier); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961) (swimmer).

14. For example, in admiralty cases the federal courts have jurisdiction without regard to whether there is diversity of citizenship and without regard to the amount in controversy. 28 U.S.C. § 1333(1) (1971). Furthermore, unlike the laws of many states, the general maritime law does not permit contribution among tortfeasors, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952); does not recognize contributory negligence as a complete bar to relief, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); and has no statute of limitations for maritime injury suits, measuring timeliness by the doctrine of laches instead. See G. GILMORE & C. BLACK,

which plaintiffs have sought to invoke the admiralty jurisdiction in order to litigate claims arising out of airplane crashes into navigable waters.[15]

The aviation cases have presented difficult problems with respect to where the tort occurred[16] and, in addition, have brought sharply into focus the need for a clear-cut determination as to whether a maritime relationship is essential if admiralty jurisdiction is to exist.[17] It was to resolve a split in the circuits on this question that certiorari was granted in *Executive Jet Aviation, Inc. v. City of Cleveland.*[18]

The *Executive Jet* case arose out of an accident which occurred after a jet aircraft taking off from the Burke Lakefront Airport in Cleveland, Ohio, struck a flock of sea gulls a few seconds after leaving the runway. The plane lost power and as it descended toward the runway it veered slightly to the left, struck the airport perimeter fence and the top of a pick-up truck, and then settled into the navigable waters of Lake Erie some 1000 feet from shore.[19] No one was injured in the crash but the plane was a total loss. The owners filed a claim for damages in the United States District Court for the Northern District of Ohio, alleging that the crash had resulted from the defendants' negligence in clearing the aircraft for take-off and in failing either to remove the sea gulls from the runway or to give adequate warning of their presence.[20] Federal jurisdiction was alleged under the general admiralty jurisdiction statute.[21]

The district court held that admiralty jurisdiction exists only if the alleged tort has both a maritime locality and a maritime relationship and, finding that neither of these requirements was met, dismissed for want of admiralty jurisdiction.[22] On appeal, the United States Court

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15. *E.g.*, Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968); Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963); D'Aleman v. Pan Am. World Airways, 259 F.2d 493 (2d Cir. 1958); Harris v. United Airlines, Inc., 275 F. Supp. 431 (S.D. Iowa 1967); Horton v. J. & J. Aircraft, 257 F. Supp. 120 (S.D. Fla. 1966); Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954); Lacey v. L. W. Wiggins Airways, Inc., 95 F. Supp. 916 (D. Mass. 1951).

16. *See, e.g.*, Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253-61 (1972), and cases cited, note 13 *supra*.

17. *See* text & notes 13-14 *supra*.

18. 409 U.S. 249 (1972).

19. *Id.* at 250.

20. Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 152 (6th Cir. 1971), *discussed in* 26 ARK. L. REV. 390 (1972).

21. 28 U.S.C. § 1333(1) (1971) provides that:

> 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.

22. 409 U.S. at 251.

of Appeals for the Sixth Circuit affirmed, holding that the alleged tort occurred on land and concluding that it was therefore unnecessary to consider the maritime relationship question.[23] But the United States Supreme Court took the opposite approach. Holding that the absence of a significant maritime relationship defeated admiralty jurisdiction, the Supreme Court found it unnecessary to reach the question of whether the alleged negligence had a maritime locality.[24]

Specifically, the Supreme Court held that unless the wrong bears a significant relationship to traditional maritime activity, "claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary,"[25] and that neither the fact that the plane goes down on navigable waters nor the fact that the wrong occurs while the plane is flying over navigable waters is sufficient to create such a relationship.[26] After concluding that the case then before it bore no relationship to traditional maritime activity,[27] the Court went on to hold that "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."[28]

At first blush the decision appears to represent simply a reluctance to permit the admiralty jurisdiction of the federal courts to be invoked in, and the substantive maritime law to be applied to, claims which are not related to maritime activities and which could be determined under state substantive law.[29] Closer analysis reveals that the holding goes further than this, however, and that the opinion gives rise to undesirable implications—both constitutional and practical—whose effects may be far-reaching indeed.

CONSTITUTIONAL IMPLICATIONS

The Court's determination that a significant maritime relationship is a *sine qua non* of admiralty jurisdiction over aviation tort cases "absent legislation to the contrary" suggests that Congress has the power to bring within the admiralty jurisdiction torts which are totally un-

23. 448 F.2d at 154.
24. 409 U.S. at 267-68, 274.
25. *Id.* at 268.
26. *Id.* at 270-71.
27. *Id.* at 273.
28. *Id.* at 274.
29. Although it would always be possible to apply the substantive law of some state, determination of which state's law should be applied can be difficult. Since potential liability varies from state to state, if state substantive law is applicable prudent aircraft owners and operators must protect themselves with sufficient liability insurance to cover the greatest possible liability they would be subject to in any state. For a discussion of these and other problems resulting from non-uniform laws with respect to aviation accidents, see Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests and Teapots*, 37 J. AIR L. & COM. 3, 7-13 (1971). *See generally* Stolz, *supra* note 14, at 664-65.

related to traditional maritime activities, to the exclusion of state substantive law[30] and possibly to the exclusion of the state courts as well.[31] Implicit in the Court's holding is a determination that the requirement of a significant maritime relationship is not imposed by the admiralty clause of the United States Constitution,[32] for if it were, then unquestionably it could not be dispensed with by legislation to the contrary.[33] And since maritime locality is also not constitutionally required,[34] it necessarily follows either that there are no constitutional limitations on the kinds of torts which are cognizable in admiralty or that the maritime locality and maritime relationship requirements are requirements in the alternative, with either being sufficient to sustain the constitutionality of any statute which purports to extend the admiralty jurisdiction to particular kinds of tort claims, or even to *all* kinds of tort claims, having either a maritime locality or a maritime relationship. The first of these alternatives is obviously untenable.[35] While the second may be accurate after *Executive Jet,* its soundness is questionable and it is unfortunate that it has to be derived by implication from a decision in which the constitutional implications appear not even to have been considered.

The constitutional requirements for admiralty jurisdiction are, of course, whatever the Supreme Court ultimately determines they are, if and when that question is squarely presented to the Court. The

30. Cases within the admiralty jurisdiction are governed by the maritime substantive law rather than by state substantive law, whether they are brought in admiralty court or, under the saving-to-suitors provision of the admiralty clause, in state courts or as diversity cases in federal courts. Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 384 (1918); Southern Pac. v. Jensen, 244 U.S. 205, 215-18 (1917); *see* Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 258, 261-62 (1950). As to congressional power to provide for exclusive federal jurisdiction under the commerce clause, see note 68 *infra.*

31. If Congress makes the admiralty jurisdiction exclusive, as it has in some types of cases, then the claim cannot be brought in state court despite the saving clause. *See* G. GILMORE & C. BLACK, *supra* note 14, § 1-13 at 36.

32. U.S. CONST. art. 3, § 2.

33. Under the view the Supreme Court takes of the matter, Congress in fact dispensed with the requirement of a substantial maritime relationship with respect to wrongful death actions when it enacted the Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1971). The Court pointed out that wrongful death actions arising out of flights between two points in the continental United States, which it already had said bear *no* relationship to traditional maritime activity, are within the admiralty jurisdiction under the Death on the High Seas Act if they meet the locality requirement of that statute. 409 U.S. at 271 n.20, 274 n.26.

34. This is no longer open to question, since a number of exceptions to the maritime locality requirement have long been recognized. For example, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1971), provides that the admiralty jurisdiction extends to injuries inflicted by vessels on navigable waters regardless of where the injury occurs, and the Jones Act, 46 U.S.C. § 688 (1971), provides for recovery of injuries to seamen whether on land or at sea. The constitutionality of both of these Acts has been upheld. See Swanson v. Mara Bros., 328 U.S. 1 (1945) (Jones Act); United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953) (extension of Admiralty Jurisdiction Act).

35. Under article III of the United States Constitution, the federal judicial power extends to "all cases of admiralty or maritime jurisdiction." U.S. CONST. art. III, § 2. It is indisputable that these words impose *some* limitations. *See generally* 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY § 5 at 6-7 (6th ed. 1940).

implication that a significant maritime relationship is not constitutionally required under the admiralty clause, however, was necessitated neither by the Supreme Court's prior decisions[36] nor by its apparent desire to avoid calling into question the constitutional validity of the interpretation given existing statutes such as the Death on the High Seas Act.[37] Furthermore, the implication that a significant maritime relationship is not constitutionally required appears to be inconsistent with the generally held view that the purpose of the constitutional grant of federal judicial power in admiralty cases was to further the national interest in uniformity of laws dealing with navigation and commerce on navigable waters.[38] The Death on the High Seas Act, which the Court cited as being "legislation to the contrary"—that is, legislation extending the admiralty jurisdiction to cases having no relationship to traditional maritime activity—and which appears to have prompted the Court to qualify its holding with the words "absent legislation to the contrary," is not in fact legislation of that type.[39]

Until the *Executive Jet* decision, the Supreme Court apparently had not considered the Death on the High Seas Act to be a jurisdictional statute at all. Rather, it had recognized that the Act "simply provides a remedy—for deaths on the high seas—for breaches of the duties imposed by general maritime law."[40] In other words, in cases which for other reasons were within the admiralty jurisdiction, the Act provided

36. No case has been found in which the Supreme Court has held that admiralty jurisdiction exists in the absence of some relationship to navigation or commerce on navigable waters. See Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963).

37. 46 U.S.C. §§ 761-767 (1971). The Death on the High Seas Act has consistently been interpreted to allow admiralty jurisdiction over death cases arising out of aviation accidents on the high seas. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 262-64 (1972); Choy v. Pan Am. Airways Co., 1941 A.M.C. 483 (S.D.N.Y. 1941).

38. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 269-70 (1972); 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY § 1 at 1 (6th ed. 1940); Black, *supra* note 30, at 261.

39. Section 1 of the Death on the High Seas Act provides that:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761 (1971).

40. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 407 (1970). It was in *Moragne* that the Supreme Court overruled The Harrisburg, 119 U.S. 199 (1886), by holding that "an action does not lie under general maritime law for death caused by violation of maritime duties." 398 U.S. at 409. In *Moragne*, then, the Court did for the general maritime law—which is applicable to all navigable waters—what Congress already had done with respect to the high seas, that is, it provided a wrongful death remedy where none had existed before. There was no indication in *Moragne* that the Court viewed its holding as extending admiralty jurisdiction; rather, the Court quite properly recognized that an action for wrongful death under the general maritime law would lie only for breaches of maritime duties. 398 U.S. at 409.

a remedy for wrongful death where none had existed previously.[41] This appears to be the better view; indeed, the legislative history of the Act indicates that this is precisely what Congress had in mind when it enacted the statute.[42] When the bill was called up for discussion in the House it was stated that:

> The bill . . . is intended to supply a defect which now exists under what was the common-law rule as to actions affecting injuries that might be caused through the wrongful act or neglect of persons engaged in shipping on the high seas. If the injury did not result in death, a cause of action exists; the injured person might go into a court of admiralty and secure relief, but if death resulted courts applied the old common-law doctrine that the cause of action dies with the person; that is, the cause of action was personal and did not survive the injured party.
>
> The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. . . .[43]

In light of the foregoing, it seems clear that while the Death on the High Seas Act gives a right of action for deaths occurring on the high seas as a result of a maritime tort, and provides that all such suits are to be brought in admiralty in federal court, it does not create a new area of admiralty jurisdiction and is not in the strict sense a jurisdictional statute at all. The statute does not purport to give rise to a wrongful death cause of action where the victim would not have been able to sue in admiralty for his injuries had he lived.[44] Accordingly, it should not be construed to provide a remedy for a death occurring on the high seas if the death occurred in circumstances which are not otherwise within the general admiralty jurisdiction.

In the past it appears to have been assumed that anything occurring

41. Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 764-65 (3d Cir. 1963). *But see* Black, *supra* note 30, at 274n.59, where the Death on the High Seas Act is cited as a clear example of the fact that Congress has enlarged the admiralty jurisdiction conferred by the First Judiciary Act.

42. 59 CONG. REC. 4482-83 (1920) (remarks of Representative Volstead). *See also* Wilson v. Transocean Airlines, 121 F. Supp. 85, 90n.22 (N.D. Cal. 1954); Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 118 (1921).

43. 59 CONG. REC. 4483 (1920) (remarks of Representative Volstead). The House discussions also pointed up the fact that the bill makes the federal courts' jurisdiction exclusive since a wrongful death suit under the statute must be brought in admiralty in the federal district courts. But this has nothing to do with extending admiralty jurisdiction to non-maritime cases; it simply makes the admiralty jurisdiction which the federal courts already had over maritime torts exclusive if the plaintiff sues for wrongful death under this federal statute.

44. *See* text of note 39 *supra*; 59 CONG. REC. 4482 (1920). *See also* King v. Pan Am. Airways, Inc., 166 F. Supp. 136 (N.D. Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960) (California workmen's compensation law held to provide exclusive remedy against employer for wrongful death of airline employee even though the employee's death resulted from a crash on the high seas, since the only maritime connection was the fortuitous locality of the accident); *cf.* Moragne v. States Marine Lines, 398 U.S. 375, 393-401 (1970).

on the high seas was necessarily related to maritime activity. But given the *Executive Jet* holding that land-based flights between two points in the continental United States have no such relationship and that claims arising out of flights of this kind are not cognizable in admiralty, it would seem to follow that the Death on the High Seas Act is also not applicable to aviation tort cases arising out of such flights, even if death occurs due to an aircraft crash beyond the 3-mile limit, the requisite distance under the statute. The *Executive Jet* opinion clearly states a contrary position, however, when it notes that "of course, under the Death on the High Seas Act, a wrongful death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court."[45]

Viewing the scope of the Act in this manner, it is readily understandable why the Court felt compelled to qualify its holding that tort actions arising from flights between two points in the continental United States are not within the admiralty jurisdiction with the words "absent legislation to the contrary." The Court was assuming that death actions arising from such flights are, by virtue of the Death on the High Seas Act, within the admiralty jurisdiction if the plane crashes beyond the 3-mile limit, despite the fact that it had just held that such accidents are wholly unrelated to traditional maritime acivity. Such an assumption is supported neither by history[46] nor by logic.

The *Executive Jet* decision would have been much sounder had it simply held that a significant relationship to traditional maritime activity is an essential prerequisite to admiralty jurisdiction over aviation tort claims, without stating that Congress can and has legislated to the contrary. The Court could and should have left for case-by-case determination the question of what constitutes a significant maritime relationship for admiralty jurisdiction purposes, even with respect to claims arising under the Death on the High Seas Act[47] and regardless

45. 409 U.S. at 271n.20.

46. The legislative history of the Act expressly indicates congressional intent to limit the wrongful death remedy provided by the Act to cases in which death results from "the wrongful act or neglect of persons engaged in shipping on the high seas." 59 CONG. REC. 4482 (1920). In applying this statute to aviation cases, the courts have reasoned that "on the high seas" means over as well as on the water. *E.g.*, D'Aleman v. Pan Am. World Airways, 259 F.2d 493, 495 (2d Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957); *see* Wilson v. Transocean Airlines, 121 F. Supp. 85, 92 (N.D. Cal. 1954).

47. The Court stated that it was leaving for future determination the question of "whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction," but this statement was also qualified with the words "in the absence of legislation," and the Death on the High Seas Act was once again cited as such legislation. 409 U.S. at 271. For an instance in which a federal court attempted to set out a test based on five relevant factors to determine the existence of admiralty jurisdiction, see Peytavin

of where the flight originated and was to have ended. A careful reading of the Act suggests that Congress did not purport to extend the admiralty jurisdiction to torts arising out of non-maritime activity; indeed, it appears never to have done so, but with the invitation extended by *Executive Jet* it may well do so in the future.

PRACTICAL IMPLICATIONS

Under the rationale of *Executive Jet,* a single aviation accident can be expected to give rise simultaneously to tort claims which must be brought in admiralty and to other tort claims which cannot be brought there. This would be true, for example, if the New York to Miami flight, which the Court itself mentioned in passing,[48] crashed into the sea more than a marine league from shore and gave rise to both death claims and personal injury or property damage claims. The wrongful death actions would have to be brought in admiralty if the *Executive Jet* dictum with respect to the Death on the High Seas Act is accepted, while the claims for nonfatal injuries and property damage could not be brought in admiralty since, under *Executive Jet,* the requisite maritime connection would be absent and there is no "legislation to the contrary.

This is reminiscent of some of the incongruities that existed with respect to wrongful death claims before *Moragne v. States Marine Lines*[49] held that an action lies under general maritime law for death caused by violation of maritime duties.[50] Prior to that decision, if breach of a maritime duty produced injury in territorial waters (that is, inside the 3-mile limit) there was a remedy available under the general maritime law, but if death resulted from that same breach of duty the maritime law provided no remedy.[51] There never seemed to be any question that admiralty jurisdiction existed over both types of action; the problem was that the substantive maritime law provided a remedy if the victim was injured but not if he was killed.[52] The *Moragne* Court concluded that "such a distinction is not compatible with the general policies of federal maritime law."[53]

It is inconceivable that a similar distinction now can be made between death claims on the one hand, and property damage or personal

v. Government Emp. Ins. Co., 453 F.2d 1121 (5th Cir. 1972), *discussed in* Note, *New Guidelines for Admiralty Tort Jurisdiction,* 48 IND. L.J. 87 (1972).

48. 409 U.S. at 274 n.26.

49. 398 U.S. 375 (1970).

50. *Id.* at 409.

51. If the state in whose waters the death occurred had a wrongful death statute, recovery in admiralty was permitted under that statute. "The Tungus" v. Skorgaard, 358 U.S. 588 (1959).

52. Moragne v. States Marine Lines, 398 U.S. 375, 395 (1970).

53. *Id.*

injury claims on the other, arising outside the statutory 3-mile limit, as the *Evecutive Jet* Court has indicated will be done. Indeed, the distinction made in *Executive Jet* is even more anomalous than that which *Moragne* corrected, for the *Executive Jet* distinction is based on *jurisdiction*: the admiralty court does not have jurisdiction over nonfatal personal injury claims arising out of aviation accidents on the high seas if the flight was from one point in the continental United States to another, but it does have jurisdiction over any death claims arising out of precisely the same accident.

Despite the *Executive Jet* holding that, absent legislation to the contrary, claims arising out of flights between two points in the continental United States are not within the admiralty jurisdiction, the foregoing problem can be avoided if the Supreme Court, when directly faced with the question, rejects the dictum in *Executive Jet* to the effect that the Death on the High Seas Act is a jurisdictional statute extending the admiralty jurisdiction to all deaths on the high seas whether maritime-related or not, and holds that the Act simply provides a wrongful death remedy when a maritime tort on the high seas has resulted in death. If this is done, no claims arising out of aviation torts on the high seas will be cognizable in admiralty if the plane was flying between two points in the continental United States—a result which clearly is preferable to that which will be reached if the Act is held to be a jurisdictional one, automatically conferring admiralty jurisdiction even in the absence of a maritime relationship.

Although the foregoing approach can do much to overcome the inherent weakness of the *Executive Jet* opinion, an additional weakness is evident in the Court's use of the aircraft's departure and destination points as the criterion for determining that the alleged tort did not bear a substantial relationship to maritime activities.[54] Recognizing that airplanes flying over navigable waters sometimes engage in activity that traditionally has been carried on by vessels plying those same waters,[55] the Court left for future determination whether aviation torts might, under any circumstances, have a significant maritime relationship and therefore be within the admiralty jurisdiction.[56] It did not leave this question open insofar as flights within the continental United States are concerned, however. Departure and destination points appear to have little or no relevance as to whether an aviation tort with a maritime locality was substantially related to traditional maritime activity,[57] and consideration of this question in later cases will be artificially hampered

54. 409 U.S. at 274.
55. *Id.* at 271.
56. *Id.*
57. *See* Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 763 (3d Cir. 1963).

by the *Executive Jet* departure-destination criterion unless that decision is limited to the facts of the case in which it was rendered.

SCOPE OF INQUIRY INTO ADMIRALTY JURISDICTION AFTER *Executive Jet*

Executive Jet also seems destined to have an unsettling effect with respect to matters formerly considered to be well settled. At least one lower court has read the case as permitting wider inquiry into all aspects of admiralty jurisdiction; it read the decision as diminishing the binding force of the term "navigable water" for purposes of determining whether an alleged tort has a maritime locality.[58] In *Adams v. Montana Power Co.*[59] the United States District Court for the District of Montana held that a claim arising out of the capsizing of a boat on the Missouri River was not cognizable in admiralty because the accident occurred on a portion of the river which is enclosed by two dams some 25 miles apart and on which "there is now nothing resembling traditional maritime activity."[60] The court concluded that "the activities of swimmers, boaters, water skiers, and fishermen on those Montana waters on which there is no traditional maritime activity should be regulated by local law."[61] Heretofore, under the locality test, all that has been considered was whether the waters are or with reasonable improvement could be made navigable, and waters once navigable have been deemed to remain navigable despite changed conditions.[62]

It is difficult to understand why the Montana district court chose to base its decision on a new interpretation of the term "navigable waters"—that is, on a new version of the locality rule—rather than on the obvious point that the activity itself bore no significant relationship to traditional maritime activity.[63] The fact that it did so because it read

58. Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973).
59. *Id.*
60. *Id.* A similar interpretation of the locality test was suggested by the Third Circuit in Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963) (dictum), when it noted that "[t]o say that a person bathing in the shallow, and probably non-navigable in fact, waters of a public beach is within the locus of admiralty jurisdiction would be to distort the meaning of the locality test beyond what reason and policy would suggest or require." *Id.* at 763n.13. *But see* text accompanying notes 54-55 *supra.*
61. 354 F. Supp. 1111, 1113 (D. Mont. 1973).
62. D. ROBERTSON, ADMIRALTY AND FEDERALISM 118-19 (1970).
63. This is the approach used by the United States District Court for the Western District of New York in an even more recent case. There a wrongful death action was brought in admiralty, alleging that negligent operation of a generating plant resulted in drowning. Relying on *Executive Jet*, the court found that satisfaction of the maritime locality test was insufficient to sustain admiralty jurisdiction and that it must also be shown that the tortious act bore "a significant relationship to traditional maritime activity." The court went on to note that "[t]he term 'maritime activity' comprehends only those activities such as maritime service, navigation, and commerce that provided the historical justification for federal admiralty jurisdiction." Rubin v. Power Authority, 41 U.S.L.W. 2568 (W.D.N.Y. Mar. 28, 1973).

Executive Jet as encouraging "a wider inquiry into the admiralty jurisdiction problem,"[64] however, lends credence to the suggestion made earlier that the *Executive Jet* decision may well have created more problems than it solved.

CONCLUSION

While the Supreme Court's holding that aviation tort cases are not cognizable in admiralty absent a significant relationship to traditional maritime activity is a sound one, the Court's qualification of that holding with the words "absent legislation to the contrary" has needlessly raised questions as to what limitations the Constitution imposes upon admiralty jurisdiction. The cases decided by the Supreme Court prior to *Executive Jet* are consistent with the proposition that a significant maritime relationship always has been required sub silentio. Although the Court has never expressly recognized the constitutional necessity of a significant maritime relationship, recognition that such a relationship is required appears to be implicit in the general acceptance accorded to the proposition that furtherance of the federal government's interest in navigation and shipping on navigable waters prompted the constitutional grant of federal judicial power over cases of admiralty and maritime jurisdiction.[65] In the few cases in which the necessity of such a relationship has been presented to the Supreme Court, decisions have been reached on other grounds. But no Supreme Court case has been found in which the admiralty jurisdiction was upheld absent such a relationship.[66]

Now that the Court has recognized that a significant relationship to traditional maritime activity is a prerequisite to admiralty jurisdiction over aviation tort cases, it is to be expected that those lower federal courts which heretofore have upheld admiralty jurisdiction in such traditionally non-maritime cases as those arising out of swimming and diving accidents will be reluctant to continue with that approach. Logically, further developments in this area should occur by extending the *Executive Jet* rule to recognize that any tort must have a significant maritime relationship in order to be cognizable in admiralty, rather than by reading *Executive Jet* as having opened the whole field of admiralty jurisdiction for reconsideration.[67]

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64. 354 F. Supp. 1111 (D. Mont. 1973).
65. *See* authorities cited note 35 *supra*.
66. Levinson v. Deupree, 345 U.S. 648 (1952), has been cited as one case to the contrary, but since that case arose out of a collision between two pleasure boats on navigable waters it cannot be said that the wrongful conduct was wholly unrelated to navigation on navigable waters even though it had nothing to do with the shipping industry itself. *Cf.* Stolz, *supra* note 14, at 665 n.23.
67. *Compare* Rubin v. Power Authority, 41 U.S.L.W. 2568 (W.D.N.Y. Mar. 28, 1973), *with* Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973).

With respect to the aviation cases, the federal courts can promote consistency in the law by ignoring the *Executive Jet* dictum to the contrary—so long as it is dictum—and continuing to apply the Death on the High Seas Act as a remedial statute rather than as a jurisdictional one. Thus, the *Executive Jet* requirement of a significant maritime relationship will apply to wrongful death claims under the Death on the High Seas Act as well as to wrongful death, property damage and nonfatal personal injury claims under the general maritime law.

In the long run, the best solution may be to find that aviation torts are not sufficiently related to traditional maritime activity to be cognizable in admiralty[68]—regardless of whether the claim is for personal injury, property damage or wrongful death, and regardless of whether the accident occurs over land or over inland waters, territorial waters or the high seas. A solution cannot be found in the approach suggested by *Executive Jet,* however, which indicates that Congress can bring nonmaritime torts within the admiralty jurisdiction and that it has done so with respect to deaths on the high seas. Nor is any rational guidance offered by the indication that while admiralty jurisdiction exists for a wrongful death claim arising out of an aviation accident on the high seas by statute, it does not exist for property damage or personal injury claims arising out of that same accident if the plane was flying between two points in the continental United States at the time the accident occurred. The opinion also indicates that there is no admiralty jurisdiction over any claim—wrongful death or otherwise—if the same aircraft crashes into territorial or inland waters rather than beyond the 3-mile limit. Such distinctions properly go to the question of whether, in a case which is otherwise within the admiralty jurisdiction, a claim has been stated or a remedy exists under the applicable substantive law, rather than to whether the federal courts have jurisdiction to entertain the claim in the first instance.

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68. Much has been written about the need for uniform laws governing aviation accidents, but this need can be met by federal legislation under the commerce clause, with state and federal courts having concurrent jurisdiction over claims arising under that federal statute just as they do over federal question cases, and with admiralty having jurisdiction over none of them. *See, e.g.,* Ingold, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?* 1968 U. ILL. L.F. 95; 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).

Indeed, Mr. Justice Stewart, speaking for the Court in *Executive Jet,* noted this possible course of action but appears to have viewed it as a means of attaining uniformity with respect to aviation torts which Congress has not already brought within the admiralty jurisdiction. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 274 (1972).