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ADMIRALTY TORT JURISDICTION—AIRPLANE CRASHES INTO NAVIGABLE WATERS WITHIN STATE TERRITORIAL LIMITS

The United States Constitution provides that “[t]he judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . .”¹ The Congress, in establishing a court system, provided that “the district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy. . . .”²

It is the purpose of this comment to trace the development and present application of rules governing jurisdiction of suits arising from crashes of aircraft into navigable waters within the territorial limits of the states.

As a result of *The Genesee Chief v. Fitzhugh*,³ decided in 1851, and *The Daniel Ball*,⁴ decided in 1870, admiralty gained jurisdiction over all lakes and rivers which are unaffected by the tides, but which are navigable waters of the United States, *i.e.*, those capable⁵ of carrying interstate commerce.⁶ Admiralty jurisdiction generally encompasses actions in either tort or contract,⁷ and suits based on contract are cognizable only where there is a maritime connection.⁸ Admiralty tort jurisdiction, however, has traditionally depended on the site of the tort,⁹ the rule of locality, or the locality test, which usually has referred to the site of the injury as opposed to the place of negligence or cause.¹⁰

¹ U.S. CONST. art. III, § 2.

² Judiciary Act of 1789, 1 Stat. 11.

³ 53 U.S. (12 How.) 443 (1851).

⁴ 77 U.S. (10 Wall.) 557 (1870).

⁵ There are three tests for capability in relation to navigable waters:

(a) Currently navigable interstate. *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

(b) Historically navigable interstate but not currently. *Madole v. Johnson*, 241 F. Supp. 379 (W.D. La. 1965). *See also* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

(c) Potentially navigable (reasonably so) interstate. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

⁶ For a detailed discussion on the historical development of waters within admiralty jurisdiction in the United States, *see* 7A J. MOORE, FEDERAL PRACTICE ¶ .200 [3], [4], (2d ed. 1972).

⁷ *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, §§ 1-10 (1957); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950).

⁸ *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *DeLovio v. Boit*, 7 F. Cas. 418, 426, No. 3776 (C.C.D. Mass. 1815).

⁹ 7A J. MOORE, FEDERAL PRACTICE, ¶ .325 [3] at 3521 (1972).

¹⁰ *See* 2 C.J.S. *Admiralty* § 63 (1972).

Fifteen years after *The Genesee Chief*, the Supreme Court decided the case of *The Plymouth*,¹¹ and since that time courts have had difficulty interpreting the locality test. *The Plymouth* involved a fire, begun on board a ship, which spread to a dock and destroyed a warehouse thereon. Holding that admiralty lacked jurisdiction to hear the case, the Court said "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 the admiralty jurisdiction."¹² The wrong complained of here was the burning of a warehouse, located on a dock, an extension of the land, and thus not within admiralty tort jurisdiction.¹³ Noting that "[t]he 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 upon the high seas or other navigable waters,"¹⁴ the Court rejected the argument that the origin of the wrongful act is the place from which jurisdiction is derived.¹⁵ Significantly, the Court stated: "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."¹⁶ This has been quoted repeatedly as authority for the proposition that the rule of locality is the sole test for tort jurisdiction in admiralty, and it may well be that the Court intended it as such.¹⁷

As one can see from *The Plymouth*, situations arise in which negligence or a wrongful act and damage or injury do not both occur on water or on land. Although these "split torts" have created much difficulty for the courts, the general rule has evolved, based on *The Plymouth*, that admiralty will take jurisdiction where the injury occurs on navigable waters, without regard to the origin of the wrongful act or negligence. Prior to the *Exten-*

¹¹ 70 U.S. (3 Wall.) 20 (1866).

¹² *Id.* at 35.

¹³ For cases holding a tort occurring on an extension of land is not within admiralty, see 1 BENEDICT, *THE LAW OF AMERICAN ADMIRALTY*, § 128a (6th ed. 1940).

¹⁴ 70 U.S. (3 Wall.) at 35.

¹⁵ "[T]he simple fact that it originated there, [on navigable waters] but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction." *Id.* at 36.

¹⁶ *Id.*

¹⁷ The Court cited without unfavorable comment a famous quote from an opinion by Justice Story, the Supreme Court's acknowledged expert on admiralty at that time:

In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within the ebb and flow of the tide. *Thomas v. Lane*, 23 F. Cas. 957, 960, No. 13902 (C.C.D. Me. 1813), in *The Plymouth*, 70 U.S. (3 Wall.) at 33-34.

sion of Admiralty Act,¹⁸ the heirs of one who had been injured on a dock and had drowned after falling off had no cause of action in admiralty, even though the decedent was struck by a cargo sling of a ship,¹⁹ because the drowning resulted from an impact that occurred on an extension of land. In contrast, when one standing on a vessel is injured in a similar manner, admiralty has jurisdiction.²⁰

These examples illustrate only a few of the problems inherent in maritime tort jurisdiction;²¹ questions of jurisdiction remain unsettled, as they have for more than 120 years.²²

Another area of admiralty law, similarly troublesome from its origin, concerns the occurrence of injury or death when an aircraft touches or passes over navigable waters. Clearly actions for wrongful death arising from airplane crashes beyond one marine league²³ from shore may be brought in admiralty under the *Death on the High Seas Act*.²⁴ Indeed, plaintiffs seeking damages for personal injuries may sue in admiralty where the tort

¹⁸ 46 U.S.C. § 740 (1948). The act gave admiralty jurisdiction over damage or injuries caused by vessels.

¹⁹ *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928).

²⁰ *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935).

²¹ For other questions see notes 56 & 57, *infra* (swimming injuries not connected with maritime commerce); *Hastings v. Mann*, 226 F. Supp. 962 (E.D.N.C. 1964) (whether one injured while standing in water can bring an action in admiralty).

²² See, e.g., *BENEDICT, ADMIRALTY*, 173 (1850), written in the days when the rule of strict locality was rarely questioned. By the turn of the twentieth century, one author had noted the existence of two American cases holding that locality was not the sole test. *R. HUGHES, ADMIRALTY* at 216-17 (1901). Although there were lower court cases requiring the relation to a vessel or its owners, the author dismissed them and held to the locality rule. *Id.* at 195, 220. For an example of modern works favoring abolition of the strict locality rule, see 7A J. MOORE, *FEDERAL PRACTICE*, ¶ 325 [2], [3], [5] (2d ed. 1972); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950). Nevertheless, most modern works consider the strict locality rule well entrenched. See, e.g., 1 KREINDLER, *AVIATION ACCIDENT LAW*, § 2.10 (1971).

²³ A marine league equals "one-twentieth part of a degree of latitude, or three geographical or nautical miles." *BLACK'S LAW DICTIONARY* 1120 (4th ed. 1968). The *Death on the High Seas Act*, 46 U.S.C. §§ 761 *et seq.* (1958), specifically applies only to the high seas beyond one league from shore.

²⁴ See, *D'Aleman v. Pan Am. World Airways*, 259 F.2d 493 (2d Cir. 1958); *Trihey v. Transocean Air Lines, Inc.*, 255 F.2d 824 (9th Cir. 1958); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957); *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir. 1955); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971); *Pardonnet v. Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N.D.Ill. 1964); *Blumenthal v. United States*, 189 F. Supp. 439 (E.D.Pa. 1960), *aff'd*, 306 F.2d 16 (3d Cir. 1962); *Lavello v. Danko*, 175 F. Supp. 92 (S.D.N.Y. 1959); *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958); *Stiles v. Airlines, Inc.*, 161 F. Supp. 125 (E.D.La. 1958), *aff'd*, 268 F.2d 400 (5th Cir. 1959); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954); *Lacey v. L. W. Wiggins Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 459, *appeal denied*, 293 N.Y. 878, 49 N.Y.S.2d 271 (1943).

has occurred beyond the one league limit, even though the *Death on High Seas Act* does not apply.²⁵

However, the problem that arises where an aircraft plunges into navigable waters within one marine league from shore²⁶ has not been easily solved. *Weinstein v. Eastern Airlines*²⁷ began a decade of great uncertainty in this facet of aviation and admiralty law. An Eastern airliner took off from a Boston airport on a Boston to Philadelphia flight, and crashed into Boston harbor, in navigable waters within one marine league from the shore, killing and injuring various passengers and members of the crew. In a suit brought under admiralty jurisdiction in a Pennsylvania federal district court, alleging Eastern's negligence in maintenance, operation and control of the aircraft,²⁸ the court held that "in the absence of statute, a maritime locality plus some maritime connection is necessary for admiralty jurisdiction."²⁹ On appeal, the circuit court reversed, holding that admiralty tort jurisdiction depends solely on locality. "If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required."³⁰

Giving new life to the strict locality theory, *Weinstein* became a major source authority for those espousing this view.³¹ Nevertheless, other courts cited the holding with disapproval,³² adopting the "locality-plus" test³³

One should note that this principle has been established, even though the act, 46 U.S.C. §§ 761, *et seq.*, does not mention airplanes or airplane crashes.

²⁵ See *Horton v. J. & J. Aircraft, Inc.*, 257 F. Supp. 120 (S.D. Fla. 1966); *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874 (W.D.Pa. 1965); *Bergeron v. Aero Associates, Inc.*, 213 F. Supp. 936 (E.D.La. 1963).

²⁶ It is well to note here that the *Death on the High Seas Act* does not apply "to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." 46 U.S.C. § 767 (1920).

²⁷ 203 F. Supp. 430 (E.D.Pa. 1962), *rev'd in part*, 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

²⁸ Libellants also alleged breach of warranty and breach of contract; however, consideration of these grounds is beyond the scope of this comment.

²⁹ 203 F. Supp. at 433.

³⁰ 316 F.2d at 761.

³¹ See, e.g., *Scott v. Eastern Airlines, Inc.*, 399 F.2d 14 (3d Cir. 1968); *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971); *Harris v. United Air Lines, Inc.*, 275 F. Supp. 431 (S.D.Ia. 1967); *Horton v. J. & J. Aircraft, Inc.*, 257 F. Supp. 120 (S.D.Fla. 1966); *Uttinger v. United States*, 246 F. Supp. 1022 (S.D. Ohio 1965).

³² See, e.g., *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Smith v. Guerrant*, 290 F. Supp. 111 (S.D.Tex. 1968). Some other cases cite *Chapman* and/or *McGuire* as authority without mentioning *Weinstein*. See, e.g., *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972); *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969); *J. W. Peterson Coal & Oil Co. v. United States*, 323 F. Supp. 1198 (N.D.Ill. 1970); *O'Connor and Co. v. City of Pascagoula*, 304 F. Supp. 681 (S.D. Miss. 1969); *Hastings v. Mann*, 226 F. Supp. 962 (E.D.N.C. 1964).

³³ *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972); *Gowdy*

with some leaning toward abandoning locality for certain torts unconnected with maritime commerce.³⁴

The next action arising from an aircraft crash in navigable waters, *Rapp v. Eastern Airlines, Inc.*,³⁵ like *Weinstein*, was the result of a crash in Boston Harbor. The district court followed *Weinstein* on the question of jurisdiction without discussion.³⁶ On appeal, as in *Scott v. Eastern Airlines, Inc.*,³⁷ the decision on that question was affirmed, both initially³⁸ and upon rehearing.³⁹ A similar case, *Harris v. United Airlines, Inc.*,⁴⁰ involved a crash in Lake Michigan within the territorial limits of Illinois. The court, relying on *Weinstein* and *Scott*, said "the weight of authority is that locality alone determines whether or not a tort claim is within admiralty jurisdiction."⁴¹ A third case, *Hornsby v. The Fishmeal Co.*,⁴² arose from a crash of two small aircraft above waters of the Gulf of Mexico (within the one marine league limit). The district court judge summarily held admiralty had jurisdiction, citing *Weinstein* as authority.⁴³ The court of appeals tacitly affirmed this finding,⁴⁴ although reversing the lower court as to the case's result.

Two other cases, not strictly within the scope of the instant discussion, merit some comment. One, *Horton v. J. & J. Aircraft, Inc.*,⁴⁵ involved a plane crash on the high seas. Because the libel was for personal injury, it did not come within the *Death on the High Seas Act*, thus necessitating the use of reasoning along the lines of *Weinstein* in order to invoke jurisdiction. The court cited the *Weinstein* analogy to the "cases where the Federal Courts have taken admiralty jurisdiction of deaths due to plane crashes under the *Death on the High Seas Act* . . ." ⁴⁶ and concurred with that rationale. The opinion noted that "the Supreme Court has held that in tort, admiralty jurisdiction depends entirely on locality," ⁴⁷ citing *At-*

v. United States, 412 F.2d 525 (6th Cir. 1969); *J. W. Peterson Coal & Oil Co. v. United States*, 323 F. Supp. 1198 (N.D.Ill. 1970).

³⁴ See *Smith v. Guarrant*, 290 F. Supp. 111, 114-15 (S.D. Tex. 1968), in which the court promotes the idea of abandoning the locality test altogether.

³⁵ 264 F. Supp. 673 (E.D.Pa. 1967).

³⁶ *Id.* at 680.

³⁷ 399 F.2d 14 (3d Cir. 1968).

³⁸ *Id.* at 17.

³⁹ *Id.* at 25.

⁴⁰ 275 F. Supp. 431 (S.D.Ia. 1967).

⁴¹ *Id.* at 432.

⁴² 285 F. Supp. 990 (W.D.La. 1968).

⁴³ *Id.* at 993.

⁴⁴ 431 F.2d 865, 867 (5th Cir. 1970).

⁴⁵ 257 F. Supp. 120 (S.D.Fla. 1966).

⁴⁶ *Id.* at 121.

⁴⁷ *Id.*

lantic Transport Co. of West Virginia v. Imbrovek.⁴⁸ However, *Imbrovek* would seem doubtful authority for this proposition.⁴⁹

The other case, *Kropp v. Douglas Aircraft Co.*,⁵⁰ came within the *Death on the High Seas Act*. Although numerous cases have held such an event to be the basis for a libel in admiralty,⁵¹ and none have held contra, the court nevertheless devoted a great deal of attention to the issue of jurisdiction, refusing, unlike some other courts,⁵² to overlook queries posed regarding the strict locality test.⁵³ However, *Kropp* concurred with *Weinstein's* findings with little objection, stating that "the exercise by this court of admiralty jurisdiction under the [*Death on the High Seas Act*] is clearly warranted."⁵⁴

As cursory perusal of the cases in the area will reveal, *Weinstein's* basic premise, strict locality, has not been embraced universally. One of the first cases to challenge the apparent citadel was *McGuire v. City of New York*,⁵⁵ in which the district court held that an injury sustained by a swimmer was not cognizable in admiralty. Stating that "[t]he basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location,"⁵⁶ the district judge found that a swimmer on navigable waters has no such maritime connection, and dismissed the libel for lack of jurisdiction. The opinion expounded further:

That a tort may have occurred on navigable waters is merely a prima facie test of admiralty jurisdiction. . . .⁵⁷ Not every tort committed

⁴⁸ 234 U.S. 52, 59 (1914).

⁴⁹ See note 68 *infra* and accompanying text.

⁵⁰ 329 F. Supp. 447 (E.D.N.Y. 1971).

⁵¹ See note 23 *supra*.

⁵² See, e.g., *Hornsby v. Fishmeal Co.*, 285 F. Supp. 990 (W.D.La. 1968); *Harris v. United Airlines, Inc.*, 275 F. Supp. 431 (S.D.Ia. 1967); *Rapp v. Eastern Airlines, Inc.*, 264 F. Supp. 673 (E.D.Pa. 1967); *Horton v. J. & J. Aircraft, Inc.*, 257 F. Supp. 120 (S.D.Fla. 1966).

⁵³ See note 70 *infra* concerning the finding of a maritime connection in *Weinstein*. The court in *Kropp* also raised questions it believed to be unsettled:

(a) Whether an occurrence above the surface is within admiralty, 329 F. Supp. 447 at 454, and,

(b) if a maritime location is a necessity, whether the mere factor of location imparts a maritime connection. The court accepted without protest the third circuit's finding in *Weinstein* that such a circumstance is sufficient. *Id.* at 454.

⁵⁴ 329 F. Supp. 447 at 455.

⁵⁵ 192 F. Supp. 866 (S.D.N.Y. 1961).

⁵⁶ *Id.* at 868. For cases holding *contra*, see *Davis v. City of Jacksonville Beach*, 251 F. Supp. 327 (M.D.Fla. 1965); *King v. Testerman*, 214 F. Supp. 335 (E.D.Tenn. 1963).

⁵⁷ 192 F. Supp. 866, at 870. One should note here that in addition to citing *Sydney Blumenthal & Co. v. United States*, 30 F.2d 247 (2d Cir. 1929), as source authority for this proposition, the court also cited *Imbrovek*. *Imbrovek* has been cited by proponents

on admiralty waters may be redressed in the admiralty courts. Only those which have a maritime character, which deal with a maritime subject matter, are properly within admiralty jurisdiction.⁵⁸

In a continuing barrage, the court referred to the authors of treatises⁵⁹ who had expressed dissatisfaction with the strict locality rule and who had urged the requirement of a vessel.⁶⁰ The opinion, summarizing its holding, suggested that "the guide to admiralty jurisdiction must be the needs of the sea or the needs of seagoing commerce."⁶¹

The effect of *McGuire* was to give courts disgruntled over the strict locality point of view a new angle of attack and another source of authority.⁶² Until recently, however, none of the cases following this "locality-plus" theory have involved aircraft crashes.

It is valuable to digress to observe some of the difficulties in the area that have not yet been resolved.⁶³ First, has the United States Supreme Court actually endorsed the strict locality theory? As noted previously,⁶⁴ two cases in particular have been considered by many subsequent decisions to have embraced that test. Both *The Plymouth* and *Imbrovek* contained language to this effect, but the decisions following *McGuire* took exception to this interpretation. In *Chapman v. City of Grosse Pointe Farms*,⁶⁵ for example, the court pointed out that Mr. Justice Hughes' opinion in *Imbrovek*

of each side of the jurisdiction test argument as the Supreme Court's recognition of the side espoused.

⁵⁸ 192 F. Supp. 866 at 870-71.

⁵⁹ See ROBINSON, ADMIRALTY, §§ 8, 9 (1939); 1 BENEDICT, THE LAW OF AMERICAN ADMIRALTY, § 61 (6th ed. 1940); and footnote 21 *supra*.

⁶⁰ 192 F. Supp. 866, 871 (S.D.N.Y. 1961). The court referred twice to a connection with a vessel and cited three passages from Robinson (note 59 *supra*), stating the importance of a connection with a vessel. *London Guarantee & Accident Co. v. Indus. Accident Comm'n*, 279 U.S. 109 (1929), held that the injury sued on need not have been committed on board a vessel. It appears that the opinion is looking at a connection with maritime commerce in general, rather than with a vessel in particular.

⁶¹ 192 F. Supp. 866 at 871.

⁶² *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Smith v. Guerrant*, 290 F. Supp. 111 (S.D. Tex. 1968); *Hastings v. Mann*, 226 F. Supp. 962 (E.D.N.C. 1964). Other cases cited *Chapman's* decision on this point. See, e.g., *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972); *Gowdy v. United States*, 412 F.2d 525 (6th Cir. 1969); *J. W. Peterson Coal & Oil Co. v. United States*, 323 F. Supp. 1198 (N.D.Ill. 1970); *O'Connor and Co. v. City of Pascagoula*, 304 F. Supp. 681 (S.D.Miss. 1969).

⁶³ "Not yet" here means prior to December, 1972. This date is relevant in that some problems were clarified in a case decided in December of that year. See notes 77, *et seq.*, and accompanying text.

⁶⁴ See notes 17 and 57 *supra*.

⁶⁵ 385 F.2d 962 (6th Cir. 1967) (suit brought subsequent to injury sustained by swimmer who dove from pier into 18 inches of water).

stated that the tort had a maritime connection, thus avoiding a situation where the Court would have to select one or the other.⁶⁶

Second, several courts have noted⁶⁷ that most courts touting strict locality, including *Weinstein*, have "gone the extra mile" and found a maritime connection, although they state that this is not required in order for admiralty jurisdiction to be asserted.⁶⁸

Some see a third difficulty in that the *Extension of Admiralty Act*⁶⁹ draws "into the tort jurisdiction cases of injury to person or property 'caused by a vessel,' whether or not 'done or consummated on land,'" ⁷⁰ thus abrogating the rule of strict locality.⁷¹

Thus the question was ripe for determination⁷² when another passenger jet fell into the navigable waters of Lake Erie, within the territorial limits of Ohio. The resultant litigation, *Executive Jet Aviation, Inc. v. City of Cleveland*,⁷³ was dismissed by the district court for want of admiralty jurisdiction,⁷⁴ and appeal to the sixth circuit produced the same result.⁷⁵ All was left to the Supreme Court.⁷⁶

Writing for a unanimous court, Justice Stewart concluded

that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—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 relation-

⁶⁶ 234 U.S. 52, at 61. See note 68 *infra*.

⁶⁷ See, e.g., *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Smith v. Guerrant*, 290 F. Supp. 111 (S.D.Tex. 1968). It should be noted that the same point was argued before the Supreme Court in 1914 and noted in the Court's opinion in *Imbrokek*, 234 U.S. 52, 60 (1914).

⁶⁸ See, e.g., *Atlantic Trans. Co. v. Imbrokek*, 234 U.S. 52, 61 (1914); *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758, 763 (3d Cir. 1963); and *Davis v. City of Jacksonville Beach*, 251 F. Supp. 327, 328 (M.D.Fla. 1965).

⁶⁹ 46 U.S.C. § 740 (1948).

⁷⁰ Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 n. 30 (1950).

⁷¹ *Id.*

⁷² As shown later, it was *so* ripe that the Court *may* have gone further than necessary, thus breaking its customary rule of deciding as little as possible in order to dispose of the case. See note 79 *infra*.

⁷³ 448 F.2d 151 (6th Cir. 1971), *aff'd*, 93 S. Ct. 493 (1972).

⁷⁴ The court stated that admiralty jurisdiction could not apply, even under the strict locality test, because the sea gulls were sucked in by the engines while the craft was over land. *Id.* at 154.

⁷⁵ *Id.*

⁷⁶ *Cert. granted*, 405 U.S. 915 (1972).

ship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.⁷⁷

The Court additionally stated that traditional maritime activity cannot be established by the theory employed in *Weinstein*,⁷⁸ viz., that the craft upon striking the water is endangered by the hazards of the sea such that admiralty jurisdiction should attach.

Although the dangers . . . faced by a plane that has crashed . . . may be superficially similar to those encountered by a sinking ship, the plane's unexpected descent will almost invariably have been attributable to a cause unrelated to the sea . . . and the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty.⁷⁹

The Court, however, leaving open several aspects, did not completely eliminate the possibility of aviation torts ever being held to have the required maritime nexus.⁸⁰ Further, the ruling appears to apply only to aircraft, thus leaving in doubt the question of whether strict locality is gone forever. Moreover, Justice Stewart called for Congressional legislation to clarify aviation law in general. Finally, the last sentence of the opinion raised another problem when it held "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* (emphasis added)." ⁸¹

This holding would indicate that the Court did not intend the ruling to apply to international flights. Accordingly, litigation involving the crash of an airliner, departing Washington for London, into the navigable waters of the Potomac River, apparently would not be restricted by the holding of *Executive Jet*. Fortunately, Justice Stewart did make clear that "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," ⁸² thus keeping that aspect of the problem free from doubt.

⁷⁷ 93 S.Ct. 493, 504 (1972). One should observe that the Court of Appeals refused to rule on the question of necessity of a maritime nexus, agreeing with the holding of the district court as to where the craft encountered the birds, and feeling that this foreclosed the need of such a finding.

⁷⁸ See 316 F.2d at 763; 448 F.2d at 163-64.

⁷⁹ 93 S. Ct. at 505.

⁸⁰ *Id.* at 505-06.

⁸¹ *Id.* at 507.

⁸² *Id.* at 506 n.20.

One other question remains unresolved: where does the tort occur? Although the concurring opinion at the circuit court level of *Executive Jet* considered this problem,⁸³ the Supreme Court found it unnecessary to decide, stating that because both theories raise the question of whether a maritime nexus is required, the Court need not choose either view.⁸⁴ The problem remains whether the tort occurs at the point of first impact, or at the point where the injury actually is inflicted.⁸⁵

The longstanding conflict on this point arises from statements in prior cases that, within the confines of the locality test, jurisdiction lies where the alleged negligence takes effect. According to *The Plymouth*, "takes effect" refers to the place where the substance and consummation of the damage occurs.⁸⁶ In contrast, the opinions in *Thomas v. Lane*⁸⁷ and *T. Smith & Son, Inc. v. Taylor*⁸⁸ speak of the point of first impact in deciding where the tort occurs.

The facts in *Executive Jet* posed an ideal opportunity for the Court to decide which view to use. Immediately upon takeoff and while still over land, sea gulls were sucked into the engines, causing the plane to lose altitude and fall into Lake Erie. Thus, the first impact occurred over land, the substance and consummation, on navigable water. Unfortunately, the Court characteristically refused to decide all questions raised, leaving for the future this determination.⁸⁹

⁸³ 448 F.2d at 154-55. See *Wiper v. Great Lakes Eng'r Works*, 340 F.2d 727 (6th Cir. 1965), where a man drowned subsequent to tripping on a negligently maintained dock. The court held, *inter alia*, that

the decedent was on land at the time he was caused to fall. Thus the tort was complete before the decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages. *Id.* at 730.

The court cited for authority *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908).

For the facts in *The Plymouth*, see note 11 *supra*, and accompanying text. The *Cleveland Terminal* case arose from vessels swept downstream by a flood, striking and damaging a bridge. The Supreme Court, in affirming the lower court's dismissal for lack of jurisdiction, stated that the damage occurred on an extension of land, thus by the locality test eliminating admiralty jurisdiction.

⁸⁴ 93 S. Ct. at 504. See note 89 *infra*.

⁸⁵ For an in-depth discussion of this question, see 18 WAYNE L. REV. 1569 (1972).

⁸⁶ 70 U.S. (3 Wall.) 20, at 35.

⁸⁷ 23 F. Cas. 957 (C.C.D. Me. 1813).

⁸⁸ 276 U.S. 179 (1928).

⁸⁹ In the view we take of the question before us, we need not decide who has the better of this dispute. It is enough to note that either position gives rise to the problems inherent in applying the strict locality test of admiralty tort jurisdiction in aviation accident cases. 93 S. Ct. at 504.

Apart from the particular aspects of admiralty tort jurisdiction, tort law in general has been moving away from the old rule of *lex loci delicti*⁹⁰ for many years, and admiralty now seems to be following the other areas of tort law.⁹¹

Even though this particular area of admiralty law is still more easily described as gray rather than black and white, there is now a slight sharpening of the picture. It is suggested that Congressional action would be a highly desirable alternative to the abdication of all policy to the courts in this vital segment of maritime law. For there it may take decades and many bad results to formulate a workable theory. Further, this is a field requiring uniform legislation, because of the interstate commerce aspects and the overlapping at this point of aviation and admiralty law.

It is submitted that Congress would do well to attempt to create some uniform method of treating all claims for personal injury, death, or property damage arising from aircraft accidents. The sheer volume of cases grows daily and the determination of jurisdiction at present leaves much to be desired. Indeed, serious consideration should be given to separate federal court rules for aircraft cases because of the immensely technical nature of many of the questions involved.

S.H.M.

⁹⁰ "The law of the place where the crime or wrong took place." BLACK'S LAW DICTIONARY 1056 (4th ed. 1968).

⁹¹ For a discussion of *lex loci delicti*, see 5 U. RICH. L. REV. 331 (1971).