ADMIRALTY—JURISDICTION—FOR AVIATION TORT CLAIMS TO BE BROUGHT IN ADMIRALTY, A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY MUST BE SHOWN.

On July 28, 1968 a jet aircraft, owned by the petitioner was preparing to depart upon a domestic flight, taking off from Burke Lakefront Airport in Cleveland, Ohio adjacent to Lake Erie. The jet was cleared by respondent Dicken,[1] the federal air traffic controller at the airport. As the jet was taking off it flushed a flock of seagulls which had been on the runway. The birds rose into the path of the ascending plane causing them to be ingested into the plane's engines. This caused an almost total loss of power, and as a result the plane crashed into Lake Erie, approximately one-fifth of a statute mile offshore. Invoking federal admiralty jurisdiction under 28 U.S.C. § 1333(1),[2] the petitioner, Executive Jet Aviation, Inc. brought a suit for damages in Federal District Court, Northern District of Ohio; the allegation being that the airport authorities had negligently failed to keep the runway free of birds or to give warning of their presence. In an unreported opinion the District Court dismissed the complaint for lack of subject matter jurisdiction. Relying primarily upon *Chapman v. City of Grosse Pointe Farms*,[3] the District Court held that the alleged tort neither occurred on navigable waters nor was there a maritime relationship between the alleged wrong and the jet aircraft's commercial function. The Court of Appeals affirmed on the basis of the lack of a maritime-

[1]Other respondents included the City of Cleveland, as owner and operator of the airport, and the airport manager Phillip A. Schwenz.

[2]28 U.S.C. § 1333 (1970) (1) provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: "(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[3]Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967). Plaintiff dove from the side of a pier into approximately eighteen inches of water and sustained multiple injuries. The pier from which plaintiff dove was part of the recreational facilities owned and operated by the defendant city. The Sixth Circuit refused to apply a mechanical "locality" test, to determine whether or not admiralty tort jurisdiction was applicable. The court construed the purpose of the constitutional provision (U.S. Const. art. III §2) underlying federal admiralty jurisdiction to be the achievement of uniformity in the area of maritime commerce. With this purpose in mind the court held that the locality of the "substance and consummation" of the alleged tort could not be regarded as the only criterion for the application of admiralty tort jurisdiction.

"A relationship must exist between the wrong and some maritime service, navigation, or commerce on navigable waters." 385 F.2d. 966. The court, applying this "locality plus" test found admiralty jurisdiction to be lacking.

[4]448 F.2d 151 (6th Cir. 1971). The Court of Appeals held the determinative issue to be the location of the alleged tort. The Court held that the tort occurred when the plane was still over land; that is upon the plane striking the seagulls immediately after leaving the ground. Thus, the plane was still clearly over ground at the inception of the tort, and so admiralty tort jurisdiction could not be applied. The court determined that the tort occurred at the point of impact with the navigable waters of Lake Erie (even though it was the soaking of the plane in the water which caused it to be a total loss). This appears inconsistent with the Chapman case, supra which stated in dictum that a tort is deemed to occur at the place where injury is sustained, regardless of the place of origin of the negligent act.

locality of the alleged tort.[4] On a writ of certiorari to the United States Supreme Court, *held*, affirmed. Admiralty jurisdiction with respect to aviation tort claims exists only where there is a significant relationship to traditional maritime activity; the mere fact that the plane goes down in navigable waters or that the tort occurs while the plane is over navigable waters is insufficient to allow a party to invoke admiralty jurisdiction. *Executive Jet Aviation, Inc v. City of Cleveland*, 409 U.S. 249 (1972).

Traditionally, the "locality"[5] of the alleged tort has been the determining factor in deciding whether or not admiralty jurisdiction could be invoked in a certain case.[6] This seemingly simplistic test of admiralty tort jurisdiction has made for some rather fine distinctions when the tort did not occur wholly upon navigable water. The courts early followed the rule that the "substance and consummation" of the alleged tort had to occur upon navigable waters.[7] This "locality" test has been followed consistently since its formation.[8] Often the

---

[5]Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813), quoting Justice Story:

> 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, such as are committed on the high seas, or on waters within the ebb and flow of the tide."

For an exhaustive examination and discussion of the English origin and development of admiralty jurisdiction *see* De Lovio v. Boit, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

[6]Admiralty jurisdiction was originally limited to waters within the ebb and flow of the tide. This was a general rule which was followed in the British Admiralty Courts. This was acceptable in Britain as there was very little use of the British inland lakes and rivers for commercial purposes. However, the westward expansion which commenced during the early nineteenth century in the United States resulted in a greatly increased commercial use of inland lakes and rivers. *See* The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825) where admiralty jurisdiction was denied in a suit for wages earned on a voyage in a steamboat upon the Missouri River. This state of events was remedied by Congress in 1845 when it enacted a bill to extend federal court admiralty jurisdiction to navigable lakes and the rivers connecting them (act entitled: "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same." 5 Stat. at Large, 726 (Feb. 26, 1845)). This act was found to be constitutionally sound in the case of The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852).

[7]The Plymouth, 70 U.S. (3 Wall.) 20 (1965). *The Plymouth* concerned a steam-propeller named The Falcon which caught fire due to the negligence of its crew while anchored beside a wharf in the Chiacgo River. The flames from the Falcon spread to the wharf and certain packing-houses built on the wharf causing much damage. The court denied admiralty jurisdiction, as the origin of the wrong was on the water, but the substance and the consummation of the injury occurred on land.

> . . . (T)he 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: In other words the cause of the damage, in technical language, whatever else attended it, must have been there complete.

70 U.S. (3 Wall.) at 35.

[8]Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971); Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352, 360-361 (1969); Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41 (1943); T. Smith & Son v. Taylor, 276 U.S. 179, 181 (1928); Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 59-60 (1914); The

courts have found it difficult to draw the line using locality of the tort as the sole criterion. This has resulted in apparent inconsistency. Admiralty jurisdiction was denied in the case of a longshoreman being knocked from a dock into water[9] yet in the case of one falling from a gangplank onto a dock admiralty jurisdiction was applicable.[10] This strict adherence to the "locality" rule has been critized[11] and had resulted in admiralty jurisdiction being applied in certain cases where little if any maritime activity was concerned.[12] Other federal courts have been more reluctant to follow the dictates of the pure "locality" rule.[13] These courts have applied what has come to be called a "locality plus"

Blackheath, 195 U.S. 361, 367 (1904); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388, 397 (1886); Leathers v. Blessing, 105 U.S. 626, 630 (1882); The Belfast, 74 U.S. (7 Wall.) 624, 637 (1869); The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 215 (1867).

[9]T. Smith and Son, Inc. v. Taylor, 276 U.S. 179 (1928). While a Longshoreman, employed in the unloading of a vessel at dock, was standing upon a stage that rested solely upon the wharf near the vessel, he was struck by a sling loaded with cargo, was knocked into the water and died. The deceased was clearly engaged in maritime work at the time of the accident yet admiralty jurisdiction was denied. The court held that the blow was given while the deceased was upon land; that it was the sole and proximate cause of death. Thus, the substance and consummation of the occurrence took place on land.

[10]The Admiral Peoples, 295 U.S. 649 (1935). In *The Admiral Peoples* a passenger while disembarking from a ship, fell from the shore end of the gangplank to the dock and was injured. The court held that the gangplank was a part of the vessel and thus, the plaintiff while on the gangplank had not yet left the vessel. The fact that she fell on the dock and not in the water was held to be of little consequence. Admiralty jurisdiction was thus sustained even though the culmination of the tort clearly occurred on the dock.

In Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) a longshoreman, while unloading a vessel in navigable water, was knocked off the deck by a swinging hoist, was thrown upon the wharf and severely injured. The Supreme Court held the action to be within the federal admiralty jurisdiction. The court stated the injury was due to the blow from the crane and thus again the consummation language in *The Plymouth, supra* was very broadly applied or else ignored.

See also L'Hote v. Crowell, 54 F.2d 212 (5th Cir. 1932); The Brand, 29 F.2d 792 (D.C. Ore. 1928); The Atna, 297 F.2d 673 (W.D. S.D. 1924).

[11]*See* Black, Admiralty Jurisdiction: Critique and Suggestion;, 50 COLUM. L. REV. 259 (1950); Comment, 64 COLUM. L. REV. 1084 (1964).

[12]The invocation of admiralty jurisdiction has seemed almost absurd in those cases concerning swimming or boating accidents. In Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965), plaintiff while swimming at a public beach was struck by a surfboard and thereby injured. Admiralty jurisdiction was sustained by the court blindly following the "locality" rule. The court stated in dictum that a surfboard operated almost exclusively upon the high seas and navigable waters and "just like a small canoe or raft, potentially can interfere with trade and commerce." Thus, in dictum, the court gave the surfboard a maritime nexus.

See also King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (An injured water skier is given access to the federal admiralty courts as the injury had a maritime locality).

[13]McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961). In *McGuire*, the plaintiff, while swimming at a public beach, was injured when she stepped upon an object that protruded from the bottom. The beach was on the edge of Staten Island in New York Harbor. However, in a well reasoned opinion, Judge Dawson refused to allow the case to be heard in admiralty. The decision was largely based upon what has often been held out as the purpose of admiralty. To provide a flexible law for matters relating to the business of the sea and the needs of commerce conducted upon the sea and other navigable waters. This action contained no relationship what-

test of admiralty tort jurisdiction. This test demands that there be a maritime relation or nexus to the alleged tort in order for admiralty jurisdiction to apply.[14]

The application of the "locality" test as the exclusive test of admiralty tort jurisdiction in aviation tort cases has presented a particularly difficult question for the courts. In one of the earliest aircraft cases brought in admiralty the court denied admiralty jurisdiction on the grounds that an airplane could not be characterized as a maritime vessel, thus seemingly applying a "locality plus" test.[15] Later, seaplanes which were afloat on navigable waters were allowed to invoke admiralty tort jurisdiction.[16] Admiralty jurisdiction has clearly been established in wrongful-death actions which came about as a result of airplane crashes at sea.[17] These actions have been brought under the "Death on the High Seas Act", 46 U.S.C. § 761 (1920) (Hereinafter referred to as the DOHSA), as a literal reading of the act clearly applies to airplane crashes occurring on the high seas beyond a marine league from the shore of any state or territory.[18]

---

soever to maritime commerce. The very nature of admiralty jurisdiction could not allow such a case to come within it.

See also Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Campbell v. Hackfeld & Co., 125 F. Rep. 696 (9th Cir. 1903).

[14]Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914). In *Imbrovek* the Supreme Court had before it the direct question of whether a tort required a maritime nexus in addition to a maritime locality in order to invoke admiralty jurisdiction. The case concerned an action for personal injuries sustained by the plaintiff while he was unloading a vessel in the port of Baltimore. The plaintiff was on board the ship when the accident occurred. The Court granted admiralty jurisdiction and declined to rule on the specific issue as the Court found there was clearly a maritime relationship.

> 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.

Id. at 62.

Thus, *Imbrovek* left the issue of whether a maritime nexus is needed as well as maritime locality in order to sustain admiralty tort jurisdiction an open question.

[15]The Crawford Bros. No. 2, 215 F. 269 (W.D. Wash. 1914). This case concerned a suit for the payment of the cost of repairs to an airplace which had crashed into Puget Sound. The court refused to extend admiralty jurisdiction on the basis of lack of precedence and the failure of the legislature to provide any guide on the matter. The court held that until the legislature acted to place "this new engine of transportation and commerce" within admiralty jurisdiction that it could not be considered a maritime vessel.

[16]Matter of Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 133 N.E. 371 (1921). *Matter of Reinhardt* concerned a hydro-plane moored in the navigable waters of Gravesend Bay, Brooklyn. The plane had drifted toward the beach and plaintiff in attempting to halt its progress was injured. Judge Cardozo adjudged the question to be whether or not the plane was to be considered a vessel. It was held that "any structure used, or capable of being used, for transportation upon water, is a vessel." Cardozo did not mention the necessity of a maritime nexus. Admiralty jurisdiction was held to apply as the hydro-plane was adjudged to be a maritime vessel.

See also United States v. Northwest Air Service, Inc. 80 F.2d 804 (9th Cir. 1935).

[17]D'Aleman v. Pan American World Airways, 259 F.2d 493 (2d Cir. 1958); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955); Lacey v. L.W. Wiggins Airways, Inc. 95 F. Supp. 916, 918 (D. Mass, 1951); Wyman v. Pan American Airways, Inc. 181 Misc. 963, 966, 43 N.Y.S. 2d 420, 423, aff'd 293 N.Y. 898, 59 N.E. 2d 785 (1943).

[18]46 U.S.C. § 761 (1970):

Admiralty jurisdiction over causes of action which arose from airplane crashes occurring in navigable waters but within the territorial limits of the United States was extended in *Weinstein v. Eastern Airlines, Inc.*[19] The *Weinstein* court reasoned from *Atlantic Transport Co. v. Imrovek*[20] and the weight of authority that locality alone determined whether or not a tort claim is within admiralty jurisdiction. Nonetheless, the court felt that the situation had a maritime nexus as the crash of an airplane into navigable waters produced much the same dangers to persons and property as those which arise from a sinking ship. The court also mentioned as a means of substantiating their position, the fact that today aircraft have become very important in travel and commerce over navigable waters, replacing the ship in many instances.[21] There was also analogy made to those cases which construed the DOHSA to apply to aircraft crashes. The *Weinstein* court also adopted a locality consummation test. A few cases have followed the reasoning of *Weinstein*.[22]

The Supreme Court has now clearly overruled the *Weinstein* opinion by its decision in *Executive Jet Aviation, Inc. v. City of Cleveland*.[23] The "locality" test alone will no longer be used in determining whether aviation tort claims will come under federal court admiralty jurisdiction. Unless a significant relationship to traditional maritime activity exists, claims arising from airplane accidents will not be cognizable in admiralty in the absence of legislation to the contrary.[24]

This then raises the problem of what constitutes a significant relationship to traditional maritime activity where aviation is concerned. The Court seems to be saying that there is none. The Court argues that the rules and concepts governing a ship at sea have no application to air travel and commerce. The mere fact that a plane which has crashed into navigable water and faces the same dangers as a sinking ship is too superficial an analogy to allow one to invoke admiralty jurisdiction in a tort action arising from a plane crash.[25] From

---

> Whenever the death of a person shall be caused by a 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 ensured.

[19]316 F.2d 758 (3d Cir. 1963). In *Weinstein*, a land based commercial jet crashed into Boston Harbor shortly after takeoff. The plane was beginning a regularly scheduled flight to Philadelphia. The crash thus occurred in navigable water but within one marine league from share (thus preventing the application of DOHSA).

[20]Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 59 (1914).

[21]*Id.* at 763.

[22]Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970); Scott v. Eastern Air Lines,Inc., 399 F.2d 14 (3d Cir. 1968); Harris v. United Air Lines, Inc., 275 F. Supp. 431 (S.D. La. 1967); Rapp v. Eastern Air Lines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967).

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

[24]*Id.* at 268.

[25]*Id.* at 268-70.

this viewpoint the fact that an airplane flying over water was performing precisely the same function as a ship would not be a sufficient maritime nexus to allow invocation of the admiralty jurisdiction of the federal courts.

The Court reasons that an airplane crash into the water will occur many times as a result of factors totally unrelated to water, *i.e.*, pilot error, defective design or manufacture of airframe or engine, or error by an air traffic controller at an airport. These causes, foreign to the law of admiralty, would put a conceptual strain on courts.

> It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence "occurs" while a plane is flying over such waters is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction.[26]

A second problem concerns whether or not tort actions which arise from aircraft crashes which occur on the high seas well beyond the territorial limits of any state will be subject to admiralty jurisdiction. The Court is not called upon to answer this question but does mention its significance.[27] In a transoceanic flight, an aircraft is clearly performing the traditional function of a ship at sea. Whether or not this will be a sufficient maritime nexus is left open to question. The Court does point out that this ruling should have no effect upon actions brought in admiralty under the DOHSA as it is settled "that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful-death actions."[28]

The question of whether or not a "locality plus" test must be applied in cases other than aviation tort cases is not definitely determined by the Court. However, *Executive Jet* has already been followed in two District Court cases, neither of which concerned aviational torts. *Adams v. Montana Power Co.*[29] concerned a tort action arising from a boating accident on a navigable inland lake which was used only for recreational purposes. Admiralty jurisdiction was denied because of the lack of a sufficient maritime nexus.[30] In *Luna v. Star of India*[31] admiralty jurisdiction was allowed in a tort action arising from an injury to the plaintiff while she was on board an old merchant vessel which had been restored as a museum. The Court held that the "locality plus" test governed the case and found the old ship to be a "vessel"[32] thus satisfying the maritime nexus requirement of the "locality plus" test. This application of a

---

[26] *Id.* at 274.

[27] *Id.* at 272.

[28] *Id.* at 264.

[29] 354 F. Supp. 1111 (D. Mon. 1973).

[30] *Id.* at 1113.

[31] Luna v. Star of India, 356 F. Supp. 59 (S.D. Col. 1973).

[32] The *Star of India* court's reasoning in construing the floating museum to be a vessel is questionable. The Coast Guard had granted the museum exemptions from compliance with the inspection and navigation laws. The Coast Guard classified the boat as "substantially a land structure" its moorings could not be inadvertently cast off and the moorings could only be removed with special tools. *Id.* at 63.

"locality plus" test is in accord with dictum in *Executive Jet*.[33]

Clearly, the problem is now, what is a sufficient maritime nexus? Although *Executive Jet* does not resolve this question, it does imply that the requirement of a sufficient maritime nexus should be strictly construed.[34] The failure of the Court to provide more guidance in the determination of what constitutes a sufficient maritime nexus thus leaves admiralty jurisdiction in a state of uncertainty.

Grier Newlin

---

[33]Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 255-61 (1972).

[34]The Court in *Executive Jet* merely draws the distinctions between aviation rules and concepts and those governing vessels which "ply the waterways of the world." The Court does imply that admiralty law is restricted to areas concerned with navigational rules:

> That law [Admiralty] deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime lien, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Id. at 270.

Although the Court is clearly concerned with limiting admiralty jurisdiction rather than expanding it, its decision seems to indicate that the requirement of a maritime nexus should be strictly construed. There should be a showing of strong connection to maritime commerce and traditional maritime activity. It is suggested that a museum which happens to be floating on navigable water does not satisfy such a requirement, and that the court's holding in *Star of India* was thus contrary to the spirit of the *Executive Jet* decision.