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of the CCPA's reasonableness standard and "technical arts" rule, as well as the Court's reliance on its own pre-computer decisions. Until Congress acts on the matter, the Court is apparently reluctant to make it any easier to patent a computer program, preferring instead to maintain the status quo by reaffirming the more stringent prerequisites of its precedents, which do not permit an extension of the scope of a statutory process so as to include a computer program.

Conclusion

Prior to the Supreme Court decision in *Gottschalk* the CCPA had decided a series of cases which had gradually abandoned the mental steps doctrine in favor of new guidelines which would permit the patenting of mental processes under section 101 and section 112. In establishing these guidelines, the CCPA failed to delineate clearly the scope and purpose of the separate norms of the two provisions, thereby weakening the fiber of its opinions. In contrast, the Supreme Court relied on its earlier pre-computer decisions, and made no mention of the CCPA guidelines in determining that the Benson computer program did not constitute a patentable process under section 101. However, the Supreme Court made the same mistakes as the CCPA when it discussed the statutory nature of the disputed claims without clearly framing this discussion within the context of section 112. Moreover, while apparently engaging in an historical survey of its earlier decisions defining the boundaries of a patentable process, the Court left the scope of its own guidelines for the patentability of computer programs in doubt by failing to specify whether these cases were cited in support of its holding. Although the Court limited both the weight of its holding by deferring to Congress and the scope of its holding by restricting its application to similar algorithms servicing similar computers, the practical effect of its holding appears to have a greater weight and broader scope than that claimed by the Court.

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Federal Courts—Admiralty Jurisdiction—"Maritime Locality Plus Maritime Nexus" Required to Establish Admiralty Jurisdiction in Aviation Negligence Cases—*Executive Jet Aviation, Inc. v. City of Cleveland*.¹—Petitioners' jet aircraft was departing from Cleveland's Burke Lakefront Airport, adjacent to Lake Erie. The plane was bound for Portland, Maine, to pick up charter flight passengers and then continue to White Plains, New York. After being cleared for takeoff by the federal air traffic controller, the plane struck a flock of seagulls on the runway as it began its ascent. The birds were ingested into the aircraft's jet engines, causing a rapid loss of power. The plane fell, struck an air-

¹ 409 U.S. 249 (1972).

port fence and the top of a nearby truck, and then crashed into the navigable waters of Lake Erie, less than one-fifth of a statute mile off shore. The crew suffered no injuries, but the plane sank and became a total loss.

Petitioners, who owned and operated the aircraft, brought suit for damages in federal court against the City of Cleveland as owner and operator of the airport, alleging respondents' negligence in failing to maintain the runway free of the gulls and in failing to warn of their presence.³ As a basis for their action, petitioners invoked federal admiralty jurisdiction.⁴ In an unreported opinion,⁵ the district court dismissed the complaint, holding that, for a tort claim to lie within admiralty jurisdiction, two criteria must be met: (1) the alleged tort must have occurred on navigable waters; and (2) there must have been a relationship between the tort and some maritime service, navigation, or commerce.⁶ The court found neither of these criteria to be satisfied. Regarding the locality of the tortious act, the court found that, since the impact of the alleged negligence occurred when the birds were ingested into the engines, the negligence became operative upon the plane while it was over land, and concluded that once the tortious act had caused the plane to fall, it was largely fortuitous whether it came down on land or on water.⁷ Respecting the "maritime" nature of the alleged wrong, the court concluded that, even assuming that air commerce over navigable waters bears some relationship to maritime commerce, the facts of this case involved the land-connected aspects of air

² Besides the City of Cleveland, the other respondents were the airport manager and the federal air traffic controller. *Id.* at 251 n.2.

³ Petitioners also brought an action against the United States, as the employer of the federal air traffic controller. That action, brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1970), was pending in the United States District Court for the Northern District of Ohio as of the date of the Supreme Court's decision in the instant case. 409 U.S. at 251 n.3.

⁴ 28 U.S.C. § 1333(1) (1970) 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.

The plaintiff who can bring his claim within admiralty jurisdiction may enjoy a number of procedural advantages over the plaintiff who cannot. For example, the plaintiff in admiralty may bring suit in the federal courts absent diversity of citizenship, *Peyroux v. Howard*, 32 U.S. (7 Pet.) 324 (1833); absent the jurisdictional amount, *The Robert W. Parsons*, 191 U.S. 17, 33 (1903); and where no independent basis for federal jurisdiction exists; see 7A J. Moore, *Federal Practice* § 325[5], at 3602 (2d ed. 1972); Moore & Pelaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. Air L. & Com. 3, 3-4 (1967); Note, *Admiralty Tort Jurisdiction and Aircraft Accident Cases: Hops, Skips, and Jumps Into Admiralty*, 38 J. Air L. & Com. 53, 54 n.9 (1972), and authorities cited therein.

⁵ *Executive Jet Aviation, Inc. v. City of Cleveland*, Civil No. C69-464 (N.D. Ohio, June 12, 1970). [Hereinafter all citations to the district court's opinion will be to the Slip Opinion.]

⁶ *Id.* at 11; see 409 U.S. at 251.

⁷ *Executive Jet Aviation, Inc. v. City of Cleveland*, Slip Op. at 11-16; see 409 U.S. at 251-52.

commerce—*i.e.*, the operation of an airport and the takeoff of an aircraft—and that consequently the tort bore no relationship to maritime service, navigation, or commerce.⁸

On appeal, the Sixth Circuit affirmed⁹ on the ground that “the alleged tort in this case occurred on land before the aircraft reached Lake Erie”¹⁰ The court thus concluded that the locality of the tort was not on navigable waters, and consequently declined to consider the question of a maritime relationship.¹¹ On certiorari, the Supreme Court, affirming the decision of the court of appeals,¹² HELD: (1) absent legislation to the contrary, claims arising from airplane accidents are not cognizable in admiralty unless, in addition to the alleged wrong having “occurred” or having been “located” on or over navigable waters, the wrong also bears a significant relationship to traditional maritime activity;¹³ (2) the crash of a land-based aircraft into state territorial waters during a flight within the continental United States does not bear a significant relationship to traditional maritime activity;¹⁴ and, consequently, (3) “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.”¹⁵

In a unanimous opinion, the Court considered the threshold question of how to determine whether a tort claim is properly brought within federal admiralty jurisdiction. The Court reviewed the approaches taken to this problem by judges, legislators, and commentators, and acknowledged their recognition that a standard based upon the relationship between the tort and traditional maritime activity is often a more reliable test than is a mechanically applied locality rule.¹⁶ Observing that in a number of instances courts have upheld the extension of admiralty jurisdiction to tort actions involving aircraft, the Court then addressed itself to the problems involved in applying the strict locality standard to airplane crashes, and concluded that the application of such a standard often results in federal admiralty jurisdiction being invoked in cases in which it was largely fortuitous whether the aircraft fell upon land or upon navigable waters.¹⁷ Thus the Court ruled that something more than the mere locality of a crash on navigable waters is required to bring an airplane negligence case within the admiralty jurisdiction of the federal courts.¹⁸ Rather, noted the Court,

⁸ *Executive Jet Aviation, Inc. v. City of Cleveland*, Slip Op. at 19-20; see 409 U.S. at 252.

⁹ *Executive Jet Aviation, Inc. v. City of Cleveland*, 448 F.2d 151 (6th Cir. 1971).

¹⁰ *Id.* at 154.

¹¹ *Id.*

¹² *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

¹³ *Id.* at 268.

¹⁴ *Id.* at 272.

¹⁵ *Id.* at 274 (footnote omitted).

¹⁶ *Id.* at 261.

¹⁷ *Id.* at 261-68.

¹⁸ *Id.* at 268.

"[i]t 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."¹⁹ Addressing itself to the question of whether an airplane crash into navigable waters bears such a relationship to maritime activity so as to render it cognizable in admiralty, the Court examined the similarities and differences between aviation and maritime navigation, and concluded that the law of admiralty—a body of law that has traditionally been concerned with the problems peculiar to seagoing vessels—has no bearing upon air commerce.²⁰ Consequently, the requisite relationship to traditional maritime activity was found to be wanting, and the Court affirmed the judgment that the case was not cognizable in admiralty.²¹

In reaching this conclusion, the Court expressly declined to determine where the tort had "occurred"—upon land, where the impact of the negligent conduct (plane striking birds) first took place, or upon navigable waters, where the major damage (plane sinking in Lake Erie) occurred.²² Also expressly left open was the question of whether, under other circumstances, an aircraft tort can ever bear a maritime relationship sufficient to bring it within admiralty jurisdiction.²³ In addition, while a strict reading of *Executive Jet* indicates that its holding applies only to cases involving aircraft negligence claims, the opinion provides a measure of support for the broader interpretation that the traditional "locality alone" test for admiralty tort jurisdiction should be replaced by a "locality plus nexus" standard applicable to *all* tort cases—not just those involving aircraft—in which admiralty jurisdiction is sought to be invoked. As will be indicated below,²⁴ however, to take such a broad position appears premature.

This note will examine the effect of *Executive Jet* on the locality test for admiralty tort jurisdiction and on the conceptual and practical problems involved in extending federal admiralty jurisdiction to aviation torts. After reviewing the application of the traditional "locality" test in determining the "maritime" nature of a tort, the note will consider the alternative approach urged by a number of courts and scholars that a "locality plus nexus" standard be adopted in dealing with the question of admiralty tort jurisdiction. It will be submitted that, despite its recognition that "reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test,"²⁵ the Supreme Court in *Executive Jet* has not discarded the "strict locality" rule as the applicable test for admiralty tort jurisdiction in any but *aviation* negligence cases.

¹⁹ *Id.*

²⁰ *Id.* at 270.

²¹ *Id.* at 272-74.

²² *Id.* at 267.

²³ *Id.* at 271.

²⁴ See text at notes 53-59 *infra*.

²⁵ 409 U.S. at 261.

It will be recommended, however, that continued judicial reliance on the strict locality test be discouraged, even in non-aviation tort cases. The note will then discuss the Court's reasoning as to whether an aircraft tort case satisfies the nexus requirement of the locality plus test. The note will comment throughout on the issues left unresolved by the Court, and finally will suggest the need for legislation designed to provide uniform treatment of aviation tort claims and to eliminate the haphazard and artificial extension of admiralty jurisdiction to matters of air commerce substantially unrelated to maritime activity.

The Non-Aviation Tort Cases

The Constitution provides that "[t]he judicial Power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction"²⁶ Congress drew upon this constitutional grant in enacting the Judiciary Act of 1789,²⁷ section 9 of which provided: "[T]he district courts . . . shall also 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, where the common law is competent to give it"²⁸ Early decisional law established the principles that the constitutional grant, and consequently its congressional implementation, encompassed all maritime contracts and torts,²⁹ and that while it was a maritime *subject matter* that brought contract disputes within admiralty jurisdiction,³⁰ it was the maritime *locality* of the wrong that rendered a tort claim cognizable in admiralty. Under this "strict locality," or "locality alone," test, the locality of the tort was the determinant of maritime jurisdiction;³¹ only if an action

²⁶ U.S. Const. art. III, § 2, cl. 1.

²⁷ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

²⁸ Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76 (footnote omitted). The substance of this provision has been carried over, in somewhat altered language, in 28 U.S.C. § 1333 (1) (1970); see note 4 *supra*.

²⁹ In *DeLovio v. Boit*, 7 F. Cas. 418, 444 (No. 3,776) (C.C.D. Mass. 1815), Mr. Justice Story announced that under the Constitution, federal admiralty jurisdiction "comprehends all maritime contracts, torts, and injuries. The latter branch [torts and injuries] is necessarily bounded by locality; the former [contracts] extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea."

³⁰ See *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26, 29 (1870); 1 E. Benedict, *The Law of American Admiralty* § 62, at 127 (6th ed. 1940).

³¹ The earliest judicial expression of this "locality" test came from Mr. Justice Story in 1813:

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.

Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813). See also *Philadelphia, Wil. & Balt. R.R. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209, 215 (1859).

The Supreme Court, later construing admiralty jurisdiction as not being limited to

arose from a wrong which occurred on navigable waters could the action be brought in admiralty.⁸²

The traditional standard by which it has been determined whether a tort is "located" on navigable waters was laid down by the Court in *The Plymouth*.⁸³

[T]he true meaning of the rule of locality in cases of marine torts . . . [is] 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 the admiralty jurisdiction. . . .

. . . .

. . . 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 upon 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.*⁸⁴

The growth of the "locality alone" test has been paralleled by the development of an alternative standard, under which a maritime locality plus a relationship to traditional maritime activity is required to invoke the admiralty jurisdiction in cases involving tort claims. This "locality plus" test has been espoused by a number of courts and admiralty scholars.⁸⁵ Its earliest expression was given in 1850 by Judge Benedict, in his treatise on admiralty:

the tidewaters, expanded it to include all navigable lakes and rivers. The Propeller *Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

⁸² A recent expression by the Supreme Court of this locality test can be found in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971), where the Court said:

The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.

For an extensive list of citations restating this principle, see *id.* at 205 n.2. See also authorities cited in Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 *Duquesne L. Rev.* 1, 7 n.23 (1968).

⁸³ 70 U.S. (3 Wall.) 20 (1866).

⁸⁴ *Id.* at 34-36 (emphasis added). The *Plymouth* has in effect been overruled by the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1970) (originally enacted as Act of June 19, 1948, ch. 526, 62 Stat. 496), to the extent that its holding denied a remedy in admiralty for damage done to land structures by vessels on navigable waters. That Act provides:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

Id.

⁸⁵ See notes 37-38, 47 *infra*.

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It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violation[s] of maritime right and duty which occur in vessels to which the Admiralty jurisdiction, in cases of contracts, applies. If one of several landmen bathing in the sea, should assault, or imprison, or rob another, it has not been held here that the Admiralty would have jurisdiction of the action for the tort.⁸⁰

Benedict's "celebrated doubt" has frequently been noted by the commentators.⁸⁷ In addition, several courts have taken the position that more is required for admiralty tort jurisdiction than a maritime locality alone.⁸⁸ However, the federal courts have remained divided as to whether "locality alone" or "locality plus" is the proper test for admiralty tort jurisdiction. Furthermore, the Supreme Court has failed to resolve this conflict. Notwithstanding the language of cases like *The Plymouth*,⁸⁹ the Court has never explicitly held that locality alone is

⁸⁰ E. Benedict, *The American Admiralty* 173 (1850) (footnote omitted). This passage, the substance of which has been retained in all succeeding editions of Benedict's treatise, has been called Benedict's "celebrated doubt." See Hough, *Admiralty Jurisdiction—Of Late Years*, 37 *Harv. L. Rev.* 529, 531 (1924).

⁸⁷ Authorities either acknowledging the proper test of admiralty tort jurisdiction as an open question or expressly favoring a nexus requirement in addition to a maritime locality include: Brown, *Jurisdiction of the Admiralty in Cases of Tort*, 9 *Colum. L. Rev.* 1, 8-9 (1909); Hough, *Admiralty Jurisdiction—Of Late Years*, 37 *Harv. L. Rev.* 529, 531-32 (1924); Robinson, *Tort Jurisdiction in American Admiralty*, 84 *U. Pa. L. Rev.* 716, 734, 737 & n.136 (1936); Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 64 *Colum. L. Rev.* 1084, 1087, 1091 (1964). See also 7A J. Moore, *Federal Practice* ¶ 325 (2d ed. 1972) (originally published as Pelacz, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 *Duquesne L. Rev.* 1 (1968)); ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* 232-33 (Prop. Off. Draft No. 2, 1968); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 *Colum. L. Rev.* 259, 264 (1950).

⁸⁸ The first judicial opinion to this effect was issued in *Campbell v. H. Hackfeld & Co.*, 125 F. 696 (9th Cir. 1903), in which admiralty jurisdiction was denied in the case of a stevedore injured while unloading a ship anchored in navigable waters. The court, citing Benedict, *supra* note 36, and criticizing the holding of *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), stated:

The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs.

125 F. at 697.

While the precise holding of *Campbell*—that a stevedore's employment is not "maritime" in nature, and therefore is not governed by the law of admiralty—has been overturned by a later decision of the Supreme Court, *Atlantic Transp. Co. v. Imbroke*, 234 U.S. 52 (1914), its broader statement—that admiralty jurisdiction requires that the subject matter of the action be of a maritime nature—retains the approval of advocates of the locality plus rule. Cf. *McGuire v. City of New York*, 192 F. Supp. 866, 868 n.2 (S.D. N.Y. 1961).

For other courts adopting a similar position, see note 47 *infra*.

⁸⁹ 70 U.S. (3 Wall.) 20 (1866). See text at notes 33-34 *supra*.

the exclusive determinant of admiralty tort jurisdiction.⁴⁰ In fact, in its 1914 opinion in *Atlantic Transport Co. v. Imbrovek*,⁴¹ the last Supreme Court case prior to *Executive Jet* to present this question, the Court found it unnecessary to resolve the issue. The case involved an action by a stevedore who sustained injuries while loading copper on board a ship. Since the maritime locality of the tort was conceded, the Court found the action cognizable in admiralty, stating:

Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. . . .

. . . 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.⁴²

The *Imbrovek* reasoning has been adopted by some courts to sustain admiralty jurisdiction over tort claims.⁴³ In fact, it has been said that in nearly all cases sustaining admiralty tort jurisdiction on the basis of the strict locality standard, the wrong was sufficiently related to maritime navigation or commerce so as to satisfy the locality plus test as well, and therefore that a maritime nexus is a requirement sub silentio of admiralty tort jurisdiction, even in cases purporting to follow the strict locality rule.⁴⁴

A number of the courts that have denied admiralty jurisdiction on the grounds that, although the tort had a maritime locality, it lacked a significant relationship to maritime commerce and navigation, have done so in cases in which the invocation of admiralty jurisdiction appears clearly unwarranted. For example, in *Chapman v. City of Grosse Pointe Farms*,⁴⁵ a swimmer at a public beach was injured when he dove off a pier into eighteen inches of water. Alleging the City's negligence in failing to erect barriers to prevent diving and in failing to warn of the shallow water, the swimmer sought to invoke admiralty jurisdiction. The Sixth Circuit, affirming the district court's dismissal of the action as not cognizable in admiralty, said:

While the locality alone test should properly be used

⁴⁰ 409 U.S. at 258.

⁴¹ 234 U.S. 52 (1914).

⁴² *Id.* at 61-62.

⁴³ See, e.g., *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758, 763 (3d Cir. 1963); *Davis v. City of Jacksonville Beach*, 251 F. Supp. 327, 328 (M.D. Fla. 1965).

⁴⁴ See *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 966 (6th Cir. 1967); *McGuire v. City of New York*, 192 F. Supp. 866, 868 n.3 (S.D.N.Y. 1961); Comment, Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters, 64 Colum. L. Rev. 1084, 1088, 1091 (1964). See also *Davis v. City of Jacksonville Beach*, 251 F. Supp. 327, 328 (M.D. Fla. 1965).

⁴⁵ 385 F.2d 962 (6th Cir. 1967).

to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined that jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts.⁴⁶

Other courts have similarly dismissed tort actions for want of a significant connection to maritime activity.⁴⁷

On the other hand, a few courts have sustained admiralty jurisdiction where the subject matter of the tort bore no more of a relationship to traditional forms of maritime commerce than was present in *Chapman*. For example, in *Davis v. City of Jacksonville Beach*,⁴⁸ in which a swimmer was injured when he was hit by a surfboard while swimming off the Florida coast, the court sustained federal jurisdiction in admiralty on the tenuous grounds that "a surfboard . . . operates almost exclusively on the high seas and navigable waters, and, just like a small canoe or raft, potentially can interfere with [maritime] trade and commerce."⁴⁹ The court admitted that the particular situation under consideration bore neither a direct nor an indirect connection to

⁴⁶ *Id.* at 966 (citations omitted).

⁴⁷ In *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961), a case similar to *Chapman*, a swimmer at a public beach sustained injuries when her hand came into contact with a submerged object on the water's bottom. In dismissing the libel as not within admiralty jurisdiction, the court said:

The proper scope of [admiralty] jurisdiction should include all matters relating to the business of the sea and the business conducted on navigable waters.

The libel in this case does not relate to any tort which grows out of navigation. It alleges an ordinary tort, no different in substance because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line. Whether the City of New York should be held liable for the injury suffered by libellant is a question which can easily be determined in the courts of the locality. To endeavor to project such an action into the federal courts on the ground of admiralty jurisdiction is to misinterpret the nature of admiralty jurisdiction.

Id. at 871-72. See *Peytavin v. Government Employees Ins. Co.*, 453 F.2d 1121, 1127 (5th Cir. 1972); *Gowdy v. United States*, 412 F.2d 525, 528-29 (6th Cir. 1969); *Smith v. Guerrant*, 290 F. Supp. 111, 113-14 (S.D. Tex. 1968). For a concurring English view, see *The Queen v. The Judge of the City of London Court*, [1892] 1 Q.B. 273 (1891). See also *J.W. Petersen Coal & Oil Co. v. United States*, 323 F. Supp. 1198, 1201 (N.D. Ill. 1970); *O'Connor & Co. v. City of Pascagoula*, 304 F. Supp. 681, 683 (S.D. Miss. 1969); *Hastings v. Mann*, 226 F. Supp. 962, 964-65 (E.D.N.C. 1964), *aff'd*, 340 F.2d 910 (4th Cir. 1965).

⁴⁸ 251 F. Supp. 327 (M.D. Fla. 1965).

⁴⁹ *Id.* at 328.

shipping or commerce, but nevertheless the *potentiality* of such a relationship between a surfboard and maritime commerce was apparently substantial enough to convince the court that "admiralty should develop the rules of liability relating to a surfboard's operation."⁵⁰

The situation involved in *Davis*, like that in *Chapman*, hardly necessitated the application of substantive admiralty law, and consequently should not have been held cognizable in admiralty.⁵¹ The *Davis* court, although purporting to follow the strict locality rule, actually adopted the same line of reasoning as that advanced in *Imbrovek*—namely, that the facts of the case under consideration were sufficient to establish a maritime nexus, if one is required in addition to a maritime locality. Nevertheless, it appears that under either test, the court reached the wrong result. That a case of this genre does not warrant the invocation of admiralty jurisdiction under the locality alone test is well illustrated by the *Chapman* opinion, wherein it is properly noted that locality alone is often immaterial to a meaningful resolution of the maritime jurisdiction problem.⁵² Alternately, the *Davis* court appears to have invoked maritime jurisdiction and applied it wholesale to a situation admittedly unrelated to traditional maritime activity, on the rather unsound basis that a surfboard somehow has the potential to affect maritime commerce.

The conflicting and unsatisfactory results that have been produced by courts attempting to determine the proper test for admiralty tort jurisdiction indicate the confusion that has developed over this question. Thus the *Executive Jet* case gave the Supreme Court the opportunity to resolve the question it had left unanswered nearly sixty years before in *Imbrovek*—namely, whether a maritime locality is the sole determinant of admiralty tort jurisdiction.

It does not appear, however, that the Court in *Executive Jet* has finally settled the matter. Although the Court's holding clearly indicates that, in addition to a maritime locality, a maritime nexus is required to bring an *aviation* negligence claim within the admiralty jurisdiction,⁵³ the larger question of the proper jurisdictional standard to apply in tort cases *generally* is left unresolved. While the Court's analysis of the problems relating to the application of the strict locality test⁵⁴ suggests an endorsement of the locality plus rule even in tort

⁵⁰ *Id.*

⁵¹ For another curious decision sustaining admiralty jurisdiction, see *King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963) (injured water skier).

⁵² See text at notes 45-46 *supra*.

⁵³ 409 U.S. at 268.

⁵⁴ In addition to observing that the "strict locality" test can result in the invocation of admiralty jurisdiction in cases in which the maritime locality of the tort is clear, but in which the tort has nothing whatsoever to do with traditional maritime activity—e.g., the *Davis* case—the Court looked also to judicial and congressional action as an indictment of the test, noting that admiralty jurisdiction has occasionally had to be extended by statute and judicial decision in order to encompass situations clearly related to maritime service, commerce, or navigation, but having no maritime situs. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971) (construing the Extension of Admiralty Jurisdiction

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cases arising out of non-aircraft-related incidents, it is submitted that *Executive Jet* should not be read as expressly standing for the proposition that in addition to a maritime locality, a maritime nexus is required to bring a *non-aviation* tort case within admiralty jurisdiction. Rather, several indicants suggest that the Court was not inclined in *Executive Jet* to do away with the locality alone test altogether. Of primary note is the fact that while the Court voiced considerable criticism of the locality alone rule, it never expressly stated that that test is no longer to be used in determining admiralty jurisdiction over non-aviation tort claims. In fact, the conclusion reached by the Court on this point is that

there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is *often* more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.⁵⁵

The binding effect of this statement in non-aviation cases is at best questionable, and a narrow reading of the case would arguably relegate it to the status of a mere dictum. This is particularly true in view of an earlier statement in *Victory Carriers, Inc. v. Law*,⁵⁶ in which the Court reiterated, without expressly endorsing, the strict locality rule.⁵⁷

Moreover, the statement that a maritime nexus is "often more sensible" than a strict locality standard suggests that in some cases reliance on the latter standard would be no less preferable than reliance on the former. In fact, the Court additionally notes that "for the traditional types of maritime torts, the traditional [strict locality] test has worked quite satisfactorily."⁵⁸ Consequently, being of the opinion that the locality alone test has proven sufficiently reliable when applied to a substantial number of maritime torts, the Court apparently was not inclined in *Executive Jet* to abolish the rule that has survived—albeit not without extensive and harsh criticism—since the early nineteenth century. In short, then, to take the position that after *Executive Jet*

Act, 46 U.S.C. § 740 (1970)); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963) (construing the Extension of Admiralty Jurisdiction Act, and also extending the maritime doctrine of unseaworthiness to permit recovery by a longshoreman for injuries caused by defects in a vessel and sustained wholly on land); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943) (extending, by analogy to the doctrine of maintenance and cure, the application of the Jones Act, 46 U.S.C. § 688 (1970), to permit recovery to a seaman injured while on land); *Strika v. Netherlands Ministry of Traffic*, 185 F.2d 555 (2d Cir. 1950) (cause of action in admiralty permitted where longshoreman was injured on shore by unseaworthiness of ship's gear). See generally 7A J. Moore, *Federal Practice* ¶ 325[4] (2d ed. 1972).

⁵⁵ 409 U.S. at 261 (emphasis added).

⁵⁶ 404 U.S. 202 (1971).

⁵⁷ *Id.* at 205. See note 32 *supra*.

⁵⁸ 409 U.S. at 254.

the locality alone test is no longer the applicable standard in non-aviation maritime tort situations would seem premature.

Despite the failure of the Court in *Executive Jet* to issue a decisive statement resolving the "locality alone or locality plus" conflict once and for all, it is submitted that continued judicial reliance on the strict locality standard in determining admiralty tort jurisdiction should be discouraged. The federal judiciary does not require an express across-the-board rejection of that rule by the Supreme Court in order to realize that the rule often generates illogical and inconsistent results.⁵⁹ Certainly, where the "traditional types of maritime torts" are involved, a maritime nexus will almost always exist, and consequently may constitute a requirement *sub silentio* of admiralty tort jurisdiction, even where a court pays lip service to the locality alone rule. But it is when courts are presented with what the Supreme Court has called "the perverse and casuistic borderline situations,"⁶⁰ that they must not lose sight of the historical justification for federal admiralty jurisdiction—namely, the federal interest in developing a uniform body of laws to govern the commerce and navigation of the nation's waterways. To ignore this basic foundation is to encourage the further distortion of the true purpose of the maritime law—a distortion which is well illus-

⁵⁹ A number of cases, including some of the Supreme Court's own decisions, indicate that admiralty jurisdiction can often depend on such variable factors as whether a longshoreman, who while loading or unloading a ship must constantly walk on and off the vessel, happens to be on the ship or on the dock at the time of injury, or whether the object causing the injury happens to be on the vessel or on the dock at the time. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), the Court stated:

[The fact] [t]hat longshoremen injured on the pier in the course of loading or unloading a vessel are legally distinguished from longshoremen performing similar services on the ship is neither a recent development nor particularly paradoxical. The maritime law is honeycombed with differing treatment for seamen and longshoremen, on and off the ship . . .

(Footnote omitted.) Notwithstanding this statement, earlier cases indicate a disturbing disparity in the treatment afforded longshoremen performing substantially the same service, even in cases in which the locality rule was consistently applied. Compare *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928) (admiralty jurisdiction denied where cargo-laden sling from ship struck longshoreman standing on pier while unloading ship and knocked him into water, causing his death) with *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) (admiralty jurisdiction sustained where longshoreman working on deck of ship was struck by hoist and knocked onto pier). See also *The Admiral Peoples*, 295 U.S. 649 (1935). For two courts reaching opposite results apparently on the basis of which direction the libellant was walking on a ship's gangplank or ladder, compare *The Brand*, 29 F.2d 792 (D. Ore. 1928) (dock to ship, admiralty jurisdiction denied), with *The Atna*, 297 F. 673 (W.D. Wash. 1924) (ship to dock, admiralty jurisdiction sustained).

Regarding the treatment afforded longshoremen, see the dissenting opinion of Justices Douglas and Brennan in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 216 (1971), in which it is argued that longshoremen should be extended uniform protection in admiralty, regardless of whether they happen to be standing on the dock or on the vessel. See also Act of Oct. 27, 1972, Pub. L. No. 92-576, § 2, 86 Stat. 1251, amending 33 U.S.C. §§ 901 et seq. (1970) (Longshoremen's and Harbor Workers' Compensation Act), which extends the Compensation Act's coverage to include employees working on shore in areas generally used in loading, unloading, repairing, or building a vessel.

⁶⁰ 409 U.S. at 255, citing *G. Gilmore & C. Black, The Law of Admiralty* 24 n.88 (1957).

trated by the *Davis* decision—and to retard the better-reasoned and more realistic ideas presented in cases such as *Chapman*.

A recent case following *Executive Jet* and confronting the problem of maritime tort jurisdiction can fairly be said to involve a "borderline" situation in which a mechanical application of the strict locality test would have produced an unsatisfactory result. In *Adams v. Montana Power Co.*,⁶¹ plaintiff's decedent was drowned when his small boat capsized on the Missouri River due to the discharge from defendant's dam. After noting that the location of two dams reduces the commerce on the interjacent stretch of the river to that "of any inland lake in Montana—small boats, fishermen, [and] water skiers,"⁶² the court considered the question of whether admiralty law should govern every tortious occurrence on the Missouri River. In this regard, the court said:

When the Supreme Court refused to mechanically apply the [strict] locality rule to an aircraft crash on Lake Erie in *Executive Jet Aviation, Inc. v. [City of] Cleveland*, . . . it diminished the binding force of the label "navigable water" and freed the courts to make a wider inquiry into the admiralty jurisdiction problem.⁶³

Citing language from *Executive Jet* to the effect that the law of admiralty was developed in order to accommodate the needs of maritime commerce and navigation,⁶⁴ the court concluded that "it was the needs of the commerce rather than the description of the water [as 'navigable'] which established admiralty jurisdiction."⁶⁵ Recognizing that no traditional maritime activity now takes place on the Missouri River between the two dams, the court dismissed the action for want of jurisdiction,⁶⁶ stating:

As I see it, 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. . . . [T]o paraphrase the Supreme Court in [*Executive Jet*], the Montana courts could plainly exercise

⁶¹ Civil No. 2115 (D. Mont., Feb. 21, 1973). [Hereinafter all citations will be to the Slip Opinion.] It is curious that the first admiralty case following *Executive Jet* should come out of Montana, in light of a statement made by one commentator who, after examining statistics on the number of admiralty cases brought in the various federal courts, concluded: "[I]t can be fairly stated that the admiralty practice in the United States District Court for the District of Montana is absolutely non-existent." Fiddler, *The Admiralty Practice in Montana and All That: A Critique of the Proposal to Abolish the General Admiralty Rules by Amendments to the Federal Rules of Civil Procedure*, and a Counterproposal, 17 *Maine L. Rev.* 15, 16 (1965).

⁶² *Adams v. Montana Power Co.*, Slip Op. at 2.

⁶³ *Id.*

⁶⁴ *Id.* at 3, quoting 409 U.S. at 269-70.

⁶⁵ *Adams v. Montana Power Co.*, Slip Op. at 4.

⁶⁶ *Id.* at 6.

jurisdiction over this action and could apply familiar concepts of Montana tort law without any effect on maritime endeavors.⁶⁷

While it is questionable whether any diminution of the binding force of the term "navigable water" can be attributed to *Executive Jet*, as the *Adams* court suggests, it is submitted nonetheless that the court has taken the proper path in reading *Executive Jet* not as requiring the adoption of a blanket locality plus test, but rather as "[freeing] the courts to make a wider inquiry into the admiralty jurisdiction problem."⁶⁸ Moreover, in contending that local law should govern the activities of swimmers, boaters, and water skiers, the court is clearly referring to, although not specifically naming, such cases as *Chapman* and *Davis*. The facts of these cases, like those in *Adams*, present issues plainly justiciable in the state courts, with the uniformity of the maritime law suffering no less for it.

The Aviation Tort Cases

The problems involved in applying the strict locality test to torts involving aircraft indicate the complications that arise when a body of law traditionally concerned with seagoing vessels is sought to be extended to a medium of transportation not contemplated during the evolution of that body of law. Admiralty law was developed over hundreds of years—not to deal with airplane crashes, but rather to settle controversies arising out of the operation and business of seagoing vessels and their crews. As the Court in *Executive Jet* suggests, permitting a tort action to be brought within admiralty jurisdiction means that not only are the doors of the federal courts open to the plaintiff, "but the full panoply of the substantive admiralty law [is available] as well."⁶⁹ Yet where an aviation negligence case is involved, it is doubtful indeed that those who contributed to the early development of maritime law contemplated that courts of admiralty would be given jurisdiction over cases involving vehicles of transportation having no connection with the navigable waterways—vehicles which, in the great majority of cases, are in fact specifically intended *not* to come in contact with the sea!

The early cases dealing with the applicability of admiralty law to aviation torts indicate that the federal courts were not willing to extend admiralty jurisdiction to include crashes of land-based aircraft into navigable waters;⁷⁰ such jurisdiction was extended only in cases involving seaplanes afloat on navigable waters, *i.e.*, when the seaplane

⁶⁷ *Id.* at 5-6.

⁶⁸ *Id.* at 2.

⁶⁹ 409 U.S. at 255.

⁷⁰ See, e.g., *The Crawford Bros. No. 2*, 215 F. 269 (W.D. Wash. 1914); cf. *Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 117-18, 133 N.E. 371, 372 (1921).

was functioning as a waterborne vessel.⁷¹ Moreover, a variety of judicial decisions and federal statutes suggested that it was not desired that substantive admiralty law be applied to incidents involving aircraft.⁷²

In 1941, however, it was held in *Choy v. Pan-American Airways Co.*⁷³ that the Death on the High Seas Act (DOHSA)⁷⁴ provided a cause of action in admiralty for wrongful deaths arising from crashes of land-based aircraft occurring on the high seas *beyond* one marine league from shore.⁷⁵ Federal admiralty jurisdiction has been upheld in numerous similar cases,⁷⁶ and the principle enunciated in *Choy* is now firmly established.

Where a plane crashes *within* the one marine league line, however, the language of the DOHSA clearly does not apply. Yet in *Weinstein v. Eastern Airlines, Inc.*,⁷⁷ the Court of Appeals for the Third Circuit sustained admiralty jurisdiction over a wrongful death action arising out of just such a crash.⁷⁸ The facts of *Weinstein* are very similar to those of *Executive Jet*. A commercial jet, on a flight to Philadelphia, struck a flock of birds on the runway of Boston's Logan International Airport and crashed into the navigable waters of Boston Harbor within the one marine league limit. In applying the strict locality rule, the

⁷¹ Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 133 N.E. 371 (1921); see United States v. Northwest Air Service, Inc., 80 F.2d 804 (9th Cir. 1935). See also Lambros Scaplane Base, Inc. v. The Batory, 215 F.2d 228, 231 (2d Cir. 1954).

⁷² The maritime doctrine of limitation of liability was held not to apply to aircraft, Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939); Dollins v. Pan-American Grace Airways, Inc., 27 F. Supp. 487 (S.D.N.Y. 1939); and criminal statutes proscribing certain acts committed on the high seas were held not to apply to crimes committed on aircraft flying over the high seas, United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950); United States v. Peoples, 50 F. Supp. 462 (N.D. Cal. 1943), although the criminal statutes in question were later amended to include crimes committed aboard aircraft, Act of July 12, 1952, ch. 695, 66 Stat. 589 (codified at 18 U.S.C. § 7(5) (1970)). In addition, § 1109(a) of the Federal Aviation Act, Act of Aug. 23, 1958, § 1109(a), 72 Stat. 799 (codified at 49 U.S.C. § 1509(a) (1970)), and its predecessor, § 7(a) of the Air Commerce Act, Act of May 20, 1926, ch. 344, § 7(a), 44 Stat. 572, exempted aircraft from conformity with the navigation and shipping laws of the United States. See also Comment, Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters, 64 Colum. L. Rev. 1084, 1089 (1964).

⁷³ 1941 A.M.C. 483 (S.D.N.Y. 1941).

⁷⁴ 46 U.S.C. §§ 761 et seq. (1970). The Act provides in part:

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

⁷⁵ 46 U.S.C. § 761 (1970).

⁷⁶ 46 U.S.C. § 761 (1970).

⁷⁷ See authorities cited in 409 U.S. at 263 n.13. For cases holding that actions for personal injuries, rather than wrongful death, involving aircraft and occurring beyond one marine league from shore are cognizable in admiralty, see authorities cited id. at 264 n.14.

⁷⁸ 316 F.2d 758 (3d Cir.), cert. denied, 375 U.S. 940 (1963).

⁷⁹ Similar results were reached in *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970), and *Harris v. United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa 1967). Cf. *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14, 21-22 (3d Cir. 1968).

Weinstein court interpreted *Imbrokek* as having expressly rejected the contention that the tort must have some connection with a vessel,⁷⁹ but found that even if a maritime nexus were required, the case at bar satisfied the requirement because "[w]hen an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels."⁸⁰ Thus, through what appears to be a misinterpretation of *Imbrokek*, the *Weinstein* court concluded that the locus of the tort is the sole determinant of admiralty jurisdiction.⁸¹

In impliedly overruling *Weinstein* to the extent that that decision sustained admiralty jurisdiction over the crash of an airplane into state territorial waters, the Supreme Court in *Executive Jet* has expressly adopted the locality plus rule as the proper determinant of admiralty jurisdiction in cases involving aircraft negligence.⁸² The basis for the Court's rejection of the strict locality test and its espousal of the locality plus test with regard to aviation-related torts is the fact that, while seagoing vessels are by their nature confined in their operations to a maritime locality, aircraft are subject to no such geographic and physical limitations. Thus, in the majority of cases involving damage or destruction to or caused by a waterborne vessel, the locus of the damage, and hence of the tort, will be of a maritime nature;⁸³ it is difficult—if not impossible—to conceive of a ship "going down" anywhere but on water. Such is not the case, however, with the "vessels" of aviation.⁸⁴ As noted by the Court, when a plane goes down it is often wholly adventitious whether it crashes on land or on water. Consequently, there is no more reason for invoking admiralty jurisdiction in the one case than in the other. Had petitioner's plane, for instance, crashed on the runway before reaching Lake Erie, invocation of admiralty jurisdiction would clearly be unwarranted; why, then, should the result be any different just because the plane managed to stay aloft an additional fraction of a mile?⁸⁵

⁷⁹ 316 F.2d at 763.

⁸⁰ *Id.* The dissenting opinion in the court of appeals in *Executive Jet* made the same argument, 448 F.2d 151, 163 (1971), which was subsequently rejected by the Supreme Court, 409 U.S. at 268-69.

⁸¹ 316 F.2d at 763. In upholding admiralty jurisdiction, the *Weinstein* court also analogized to the Death on the High Seas Act, 46 U.S.C. §§ 761 et seq. (1970), stating: If, as it has been held, a tort claim arising out of the crash of an airplane beyond the one marine league line is within the jurisdiction of admiralty, then *a fortiori* a crash of an aircraft just short of that line but still within the navigable waters is within that jurisdiction as well.

316 F.2d at 765.

⁸² 409 U.S. at 268.

⁸³ Where it is not, the claim will still be within maritime jurisdiction under the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1970). See note 34 *supra*.

⁸⁴ The term "vessel" is here used in the non-technical sense, since courts have declined to characterize airplanes as maritime vessels. See, e.g., *The Crawford Bros.* No. 2, 215 F. 269, 270-71 (W.D. Wash. 1914).

⁸⁵ The Court in *Executive Jet* presents an interesting hypothetical to illustrate the disparity of treatment that would result, were jurisdiction to depend exclusively on where

These problems serve to indicate that, because aircraft enjoy a freedom of movement unrestricted by the physical limitations that are elemental to seagoing vessels, the application of the strict locality test to aviation negligence cases would lead to results that are not only wholly fortuitous, but meaningless as well. For this reason, the Court expressly held that, absent legislation to the contrary, aircraft negligence claims are not cognizable in admiralty unless, in addition to a maritime locality, there also exists a significant nexus between the wrong and traditional maritime activity.⁸⁶

In view of the Court's reasoning, it may be asked why the "maritime locality" requirement was retained at all, either in the context of torts generally or, more particularly, in the context of aviation-related torts. It has been contended by at least one commentator that admiralty tort jurisdiction should be invoked solely on the basis of a relationship to maritime commerce, with no consideration given to the locality of the tortious incident.⁸⁷ In effect, this commentator would apply the same standard to maritime tort jurisdiction that is employed in determining the maritime nature of contracts—namely, that the subject matter of the contract be of a maritime nature, or bear a relationship to a maritime vessel or to maritime commerce.⁸⁸ Indeed, if, as the Court in *Executive Jet* suggests, the locus of an aviation tort is often wholly fortuitous, should not locality be considered totally irrelevant to a determination of whether admiralty jurisdiction may be exercised over claims arising from the tort?

Clearly, the answer must lie in the consequences that would attach to a departure from the "locality alone" test and a consequent adoption of a "nexus alone" rule. Were a maritime nexus the sole criterion needed to invoke admiralty jurisdiction over *aircraft* tort claims, then arguably the same would be true in the case of *all* "maritime" torts—aviatorial or not—for there would appear to be no better reason for requiring a maritime locality in the former instance than in the latter. Such a rule would suggest, for example, that courts of admiralty might have jurisdiction over the claims of a seaman for injuries he sustained while on shore on ship's business in an inland city.⁸⁹ Although it is

the plane ended up. The hypothetical involves two planes colliding at a high altitude, one crashing upon land and the other upon navigable waters. 409 U.S. at 267. Plaintiffs whose claims involve the second plane would have access to the federal admiralty courts and the attendant advantages of maritime law, while those whose claims arise out of the first plane would be left to seek remedies in the state courts. A further complication, apparently not considered by the Court, is whether the suitors from the first plane could bring their claims within admiralty jurisdiction by establishing that a collision with an aircraft that eventually crashes into navigable waters constitutes a maritime nexus.

⁸⁶ *Id.* at 268.

⁸⁷ Pelaez, Admiralty Tort Jurisdiction—The Last Barrier, 7 *Duquesne L. Rev.* 1, 42 (1968).

⁸⁸ See note 30 *supra*.

⁸⁹ Hypotheticals of this nature were introduced in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963), in which maritime jurisdiction was sustained under the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1970), in the case of a longshore-

arguable that such claims lie properly within the scope of federal admiralty jurisdiction, it is apparent that courts are not yet ready to extend their admiralty jurisdiction that far inland.⁹⁰ Thus the Supreme Court's holding that both a maritime locality and a maritime nexus are necessary to render an aviation negligence claim cognizable in admiralty intimates the Court's reluctance to authorize a further landward extension of the admiralty jurisdiction of the federal courts.

Despite the retention of the maritime locality requirement, the Court has expressly declined to resolve the problem of how to determine where an aviation tort "occurs" or "is located."⁹¹ As an element common to both the locality alone and the locality plus tests, the locus of the tort is critical in determining whether the federal admiralty courts should exercise jurisdiction over the claim; this is true in non-aviation cases as well. In either context, the problem of determining the situs of the tort is often difficult to solve.⁹²

In the context of aviation torts, it is sometimes nearly impossible to determine the situs of the tort. In *Executive Jet*, the problem was approached from two viewpoints. The petitioners' contention was that the substance and consummation of the tort took place when the plane crashed into Lake Erie, because that is where the damage occurred and hence where the negligence took effect. The respondents argued that the negligence took effect on land, where the plane hit the birds, because the plane was then destined to fall, the exact point of contact being largely fortuitous. The Court, pointing out that either argument would make jurisdiction depend upon the factor of chance, declined to resolve the dispute.⁹³

While it was not necessary for the Court to resolve this issue in order to decide the *Executive Jet* case, the Court's failure to deal with the question provides little, if any, guidance to courts which may subsequently be faced with similar issues. Nevertheless, as will be suggested below, future cases of this nature are likely to be disposed of on the "nexus" ground, thus eliminating the necessity of determining the locality of the tort.

As previously suggested, the basic problem underlying the *Executive Jet* controversy is that, except in situations governed by statute, admiralty law—both substantive and procedural—was neither designed nor intended to apply to aviation disputes. Maritime law arose out

man who was injured while unloading a ship when he slipped on some loose beans spilled on the dock from defective bags being unloaded from the ship. The Court declined to consider the hypotheticals any further than to say that admiralty jurisdiction will be invoked under the Extension of Admiralty Jurisdiction Act when the tort is committed "while or before the ship is being unloaded, and the impact of [the tort] . . . is felt ashore at a time and place not remote from the wrongful act." 373 U.S. at 210.

⁹⁰ Cf. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-16 (1971).

⁹¹ 409 U.S. at 267.

⁹² Regarding the non-aviation cases, see, e.g., *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928). See also *The Admiral Peoples*, 295 U.S. 649 (1935).

⁹³ 409 U.S. at 266-67.

of the need for a body of rules to govern the business of the seas. The fact that seagoing vessels often traveled waterways lying outside the territorial jurisdiction of the sovereign necessitated the development of a body of law that would provide uniform treatment of controversies common to the navigation and commerce of the sea.

It was in this light that the Supreme Court resolved the issue of whether or not the crash of a land-based aircraft into state territorial waters while on an intracontinental flight bears a significant relationship to traditional maritime activity sufficient to satisfy the jurisdictional test. In holding that it does not,⁹⁴ the Court expressly left open the question of whether an aviation tort can ever bear such a relationship sufficiently significant to render it cognizable in admiralty.⁹⁵ Arguably, notes the Court, a transoceanic flight may be thought of as "performing a function traditionally performed by waterborne vessels."⁹⁶

Notwithstanding the Court's indulgence in hypothesizing, it is doubtful that such an argument would be convincing enough to justify sustaining admiralty jurisdiction over an aviation tort claim. In the Court's own words, the "[r]ules and concepts [of maritime law] . . . are wholly alien to air commerce, . . . [and] have no conceivable bearing on the operation of aircraft, whether over land or water."⁹⁷ Moreover, assuming *arguendo* that a transatlantic flight has a significant relationship to maritime commerce because of the traditional maritime function it performs, does it not follow that a flight either wholly or partially over the Great Lakes performs the same maritime function and must therefore bear the same maritime nexus? If so, then the laws of logic require that, where *Executive Jet* recognizes no significant relationship in the latter situation, the Supreme Court would likewise find no significant nexus in the former. In short, the inapplicability of the substantive maritime law to the needs of air commerce suggests the inappropriateness of conferring admiralty jurisdiction over claims arising out of the operation of aircraft, whether they fly over land or over sea.⁹⁸

⁹⁴ Id. at 272.

⁹⁵ Id. at 271.

⁹⁶ Id. (footnote omitted).

⁹⁷ Id. at 270.

⁹⁸ Where a *seaplane* is functioning as a waterborne vessel, however, the contention appears well-founded that torts arising out of its operation should be governed by admiralty law. A recent case to this effect is *Hark v. Antilles Airboats, Inc.*, Civil No. 476/1972 (D.V.I., Mar. 7, 1973), in which a seaplane crashed during takeoff from a "marine runway." The court found that the plane had not yet reached sufficient speed or altitude to function controllably when the engine failure occurred, Id. at 3-4. Citing *Executive Jet* as overruling the cases which held that a maritime locality was the sole determinant of admiralty tort jurisdiction, id. at 4, the *Hark* court stated three reasons for permitting the claim before it to be brought in admiralty:

First, the problems of taking off and landing a seaplane differ from those encountered with conventional aircraft, and are instead influenced by the "marine" nature of the runway used. Secondly, where the flight is over international waters, as it was to be here, there are especial conveniences in using an admiralty

For this reason, it is submitted that the federal courts should not extend admiralty jurisdiction to encompass aviation tort claims, in the absence of legislative authority. As the Supreme Court observed in *Executive Jet*:

It may be, as the petitioners argue, that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases. But for this Court to uphold federal admiralty jurisdiction in a few wholly fortuitous aircraft cases would be a most quixotic way of approaching that goal. If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.⁹⁹

Clearly there is a need for uniformity in the treatment of claims arising from aircraft accidents. Just as the law of admiralty was developed in order to provide a set of rules that would not leave the settlement of maritime disputes to the peculiarities of the local law of each port, so too should modern aircraft, which traverse the nation, be governed not by the divergent laws of many jurisdictions but by a single body of federal law. However, as the Supreme Court in *Executive Jet* properly suggests, to sustain admiralty jurisdiction in a few aircraft cases would be a most artificial means of achieving uniformity in the rules governing aviation. To apply maritime law, both substantive and procedural, to a few isolated airplane crashes solely on the basis of the fortuity of the plane coming down on navigable waters would be to take a piecemeal approach toward remedying a large-scale problem. This the courts should not do. Rather, legislative action is urged as the appropriate means of ensuring uniform federal treatment of aviation-related tort claims, no matter where the accidents occur.¹⁰⁰

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forum. And finally, it seems desirable to treat ship and aircraft accidents in the same manner, insofar as possible.

Id. at 5.

The *Hark* court's first two reasons appear to be in line with the principles enunciated in *Executive Jet*, since the Supreme Court's holding was expressly restricted in scope to "flights by land-based aircraft between points within the continental United States." 409 U.S. at 274 (footnote omitted, emphasis added). Thus the Supreme Court appears to have left open the law to be applied in situations involving seaplanes flying over international waters. However, the soundness of the *Hark* court's third reason for sustaining admiralty jurisdiction—that ship and aircraft accidents should be treated in the same manner—seems questionable in light of the Supreme Court's apparent rejection of that contention. See id. at 269-70.

⁹⁹ 409 U.S. at 273-74.

¹⁰⁰ See generally Sweeney, Is Special Aviation Liability Legislation Essential? (pts. 1-2), 19 J. Air L. & Com. 166, 317 (1952).