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Case Notes

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MULTIDISTRICT LITIGATION—COLLATERAL ESTOPPEL—Due Process Requires that the Party Against Whom Collateral Estoppel Is Asserted Must Have Been a Party to the Earlier Judgment. *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973).

On March 9, 1967, a TWA jetliner and a small Beech Baron aircraft collided in mid-air near Dayton, Ohio. The collision left no survivors. The administrator of the estate of John S. Humphreys, a passenger on the TWA plane, brought a diversity action in the United States District Court for the Eastern District of Michigan against the Tann Co., owner of the small plane. By an order of the Judicial Panel on Multidistrict Litigation,[1] the suit was transferred to the Southern District of Ohio for pretrial proceedings consolidated[2] with actions brought by representatives of others involved in the accident.[3] Upon completion of the discovery proceedings, one of the cases, *Downey v. TWA*,[4] was set for trial on March 21, 1971. There were no agreements that any of the transferred cases would be consolidated with or bound by the *Downey* decision.[5] Following a verdict for Downey against TWA but not against Tann, counsel for Tann successfully moved for summary judgment in the pending case of *Humphreys v. Tann* on the ground

[1] In 1968, in response to the massive electrical antitrust cases, Congress created the Judicial Panel on Multidistrict Litigation. *See* Multidistrict Litigation Act of 1968, Pub. L. No. 90-626, 82 Stat. 109, *codified at* 28 U.S.C. § 1407 (1970).

[2] 28 U.S.C. § 1407(a) (1970) provides in part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the . . . panel . . . upon its determination that [they] will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

[3] On March 23, 1970, thirteen actions were transferred to the Ohio District. 310 F. Supp. 798 (J.P.M.L. 1970). The *Humphreys* case was transferred to join them on July 10, 1970. Humphreys v. Tann, 487 F.2d 666, 667 (6th Cir. 1973).

[4] Civil Action No. 3521ML (S.D. Ohio, Apr. 7, 1971).

[5] 487 F.2d at 667.

that Humphreys was collaterally estopped from relitigating Tann's liability.[6] *Held, reversed*: Due process of law requires that the party against whom collateral estoppel is asserted must have been a party to the earlier judgment. *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973).

The reversal by the United States Court of Appeals for the Sixth Circuit was based on the due process requirement that a party may not be bound by an earlier judgment unless he was either a party or in privity to a party to the earlier litigation.[7] In terms of collaterally estopping a party on an issue previously litigated, the requirement traditionally has been applied to both the party asserting collateral estoppel and the one against whom it is asserted. This rule, known as mutuality of estoppel, essentially states that if both parties are not bound by a prior judgment, neither is.[8] Thus one who was not a party or privy of a party to the earlier action may neither be estopped by the prior judgment nor assert it in his favor.[9] The traditional mutuality of estoppel doctrine has been followed in most jurisdictions. However, a deviation from the traditional rule was established in 1942 by the Supreme Court of California in *Bernhard v. Bank of America*.[10] The so-called Bernhard Doctrine established the notion that while due process of law requires the person against whom estoppel is asserted to have been a party to the earlier judgment,[11] there is no compelling reason for requiring that the party asserting the plea have been a party.[12] The Sixth Circuit in *Humphreys* noted that even the more liberal Bern-

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[6] *In Re* Air Crash Disaster Near Dayton, Ohio, 350 F. Supp. 757, 768 (S.D. Ohio 1972).

[7] 487 F.2d at 671.

[8] RESTATEMENT OF JUDGMENTS § 93 (1942); 34 C.J.S. *Judgments* § 1405 (1924). For a discussion of the traditional mutuality of estoppel cases, *see* Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 608-09 (1926), and Annot., 31 A.L.R.3d 1044, 1060 (1970).

[9] New Orleans v. Warner, 175 U.S. 120, 132 (1899); Litchfield v. Goodnow, 123 U.S. 549, 551-52 (1887).

[10] 19 Cal.2d 807, 122 P.2d 892 (1942).

[11] *Id.* at —, 122 P.2d at 894.

[12] *Id.*; Judge Traynor enunciated 3 pertinent issues in determining whether a plea of res judicata was valid: "1. Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2. Was there a final judgment on the merits? 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" *Id.* at —, 122 P.2d at 895.

hard rule would not allow estoppel to be asserted against Humphreys, who had not been a party to the earlier *Downey* proceeding.[13]

Although the Bernhard Doctrine does not precisely touch the facts of *Humphreys*, it is significant because it served as an impetus for the development of standards of fairness of estoppel that had a direct impact on the district court decision. After *Bernhard* was decided, there was concern for the uniform administration of justice in mass disaster cases. Commentators critically demonstrated the vast difference between offensive and defensive use of estoppel with the mutuality rule abandoned.[14] The defensive use of collateral estoppel occurs in situations in which a losing party in the first suit attempts to bring a second action on the same issues against a third party, and the third party raises the judgment in the first suit as a defense.[15] Offensive use of collateral estoppel occurs in those situations in which a losing party in the first suit is sued by a third party who seeks preclusion of an issue on the basis of the decision in the first suit.[16] As a defensive maneuver, the assertion of collateral estoppel creates the just and beneficial result of preventing a party from relitigating an issue already determined against him

[13] 487 F.2d at 671. For a list of developments following *Bernhard*, *see* 53 CALIF. L. REV. 25, 38 (1965).

It might be noted that the Ohio state law followed the strict mutuality of estoppel rule. The district court, however, ruled that the countervailing considerations relating to the efficient administration of justice in the federal court system, along with the pervasive federal influence in national airspace, called for federal law to be applied. 350 F. Supp. at 760-64. The district court relied on *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), *rehearing denied*, 357 U.S. 933 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1965), to hold that:

> a state rule need not be blindly followed in a diversity case where the state rule is not integrally related to state created rights and obligations but relates merely to the form or mode of enforcement and a conflicting federal rule exists supported by a countervailing federal policy which would be disrupted by the application of the state rule.

350 F. Supp. at 761.

On appeal, however, the Sixth Circuit found it unnecessary to determine whether a federal law should be applied rather than the Ohio law since the federal law did not conflict with Ohio law on the matter of the estoppel of Humphreys under these circumstances. 487 F.2d at 668.

[14] Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

[15] *See, e.g.*, Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942).

[16] *See, e.g.*, Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964).

simply by picking out new defendants.[17] The possible inequitable result of offensive use of collateral estoppel, however, was pointed out in the famous railroad accident hypothetical.[18] If fifty injured passengers sued the railroad one at a time and offensive collateral estoppel were available to each of them, it would be possible for the railroad to win against twenty-five of the passengers and then be estopped from defending against the remaining plaintiffs as a result of an aberrational loss against the twenty-sixth plaintiff.[19] In other words, each victory for the defendant railroad is a victory only against that particular plaintiff, whereas a single victory for any plaintiff may be used by all remaining plantiffs to estop the railroad. Thus whenever a single defendant is sued by a group of plaintiffs, offensive collateral estoppel would constantly work against that defendant but never in his favor. The defendant could not assert collateral estoppel against any passenger who had not yet sued because to do so would violate the due process requirement[20] that the party against whom collateral estoppel is asserted must have been a party to the earlier action.[21]

Offensive use of collateral estoppel has been permitted in certain multiple-plaintiff situations since *Bernard* was decided[22] but its

[17] Currie, *supra* note 14, at 292. Such defensive use of collateral estoppel was also sanctioned in *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971), to prevent the holder of a patent that had been previously determined invalid from having the validity of his patent relitigated by simply suing new defendants unless it could be shown by the patent holder that he had not been afforded a full and fair opportunity to litigate the matter in the prior suit.

[18] Currie, *supra* note 14, at 281.

[19] *Id.* at 285-89.

[20] This "against-whom" requirement is automatically included in the strict mutuality cases cited *supra* in notes 6 and 7, and was included even in *Bernhard*'s relaxed version of the mutuality rule given *supra* in note 12. Due process requires that no party be deprived of personal or property rights by a judgment without notice and an opportunity to be heard. Coca-Cola Co. v. Pepsi Cola Co., 6 W.W. Harr. 124, 36 Del. 124, 172 A. 260 (1934). It is a universal principle of jurisprudence that a person is protected from the operation of judicial proceedings to which he is not a party. Renaud v. Abbott, 116 U.S. 277, 288 (1885).

[21] As stated previously, this due process issue was precisely the grounds for reversal on appeal, as the District Court opinion allowed the plane owner Tann to estop Humphreys, a passenger who had not yet litigated.

[22] Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd in part and modified in part on other grounds*, United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th

application has been limited, and even early critics of *Bernhard* have applauded the reasoning and standards applied by the courts.[23] The standard which has evolved, that there must have been a full and fair opportunity to litigate the matter in the first action,[24] balances the interest of due process of law with that of judicial economy. Various factors should be considered in determining whether there has been a full and fair opportunity to litigate. If the party in the first action is fully aware of the implications of the adverse judgment with respect to actions pending against him, there is a presumption that he will defend the action as strenuously as possible. In *United States v. United Air Lines, Inc.*[25] twenty-four of thirty-one plaintiffs jointly litigated the liability issue in California, and the remaining seven Nevada plaintiffs were allowed the benefit of that judgment[26] because United Air Lines had had a full and fair opportunity to defend in the primary action.[27]

A strikingly different situation arises, however, if the interest defended in the first suit is much smaller than the interest in the later action. In *Berner v. British Commonwealth Pacific Airlines Ltd.*,[28] it was necessary to show willful misconduct on the part of the airlines in order to receive damages in excess of the $8,291.87 provided for by the Warsaw Convention.[29] After British Commonwealth Pacific successfully defended against an action by the estate of passenger Halmos, a new trial was granted and Halmos' estate was awarded only $35,000 on a $500,000 claim.[30] The second action was by Berner and Lesser, administrators of the estate of

Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (1967); Hart v. American Airlines, Inc., 61 Misc.2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969); Guarino v. Mine Safety Appliance Co., 31 A.D.2d 255, 297 N.Y.S.2d 639 (App. Div. 1969).

[23] Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 27-37 (1965).

[24] United States v. United Air Lines, Inc., 216 F. Supp. 709, 725-26 (E.D. Wash., D. Nev. 1962), *aff'd in part and modified in part on other grounds*, United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964).

[25] 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd in part and modified in part on other grounds*, United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964).

[26] *Id.* at 729.

[27] *Id.* at 728.

[28] 346 F.2d 532 (2d Cir. 1965).

[29] *Id.* at 534.

[30] *Id.* at 539.

the noted pianist William Kapell. At the time of the conclusion of the first action there had been no precedent for allowing the offensive assertion of collateral estoppel by a non-party,[31] and the airline, unaware that it would later be estopped as against Kapell's administrators, declined to appeal the relatively small Halmos judgment.[32] The court reasoned that it would be unfair to estop the airline under the circumstances since it would certainly have appealed had it known the *Halmos* decision would be binding in *Berner*.[33] Thus the prevailing notion is that one day in court is all that a party is allowed so long as he had a fair chance to prepare and present his case in a reasonably convenient forum, and he had full awareness of the implications for other litigation of an adverse judgment in the first case.[34]

The plaintiff in *Humphreys*, however, did not have a day in court in the traditional sense,[35] and therefore the due process requirement of *Bernhard*[36] that the party against whom estoppel is asserted must have been a party to the previous action was not fulfilled. Nevertheless, in *Humphreys*, the United States District Court for the Southern District of Ohio held that regardless of whether Humphreys had ever been an actual party to the *Downey* proceedings, he could be estopped by that decision. In so holding, the district court utilized a modified version of the "full and fair opportunity" standard and found that in the section 1407[37] consolidated pretrial proceedings Humphreys had had a full and fair opportunity to bring forth all the issues and facts and could allege no errors to his detriment in the *Downey* decision.[38] Thus, in the

[31] *Id.* at 540. Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964), was decided after *Halmos*, but before *Berner*. *Zdanok* established the principle that where a party vigorously defends the first suit with full awareness of pending actions based on the same facts, he may be precluded from relitigating against the pending actions.

[32] 346 F.2d at 539.

[33] *Id.* at 540.

[34] Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 955-56 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964).

[35] Tann was the party asserting his prior victory in the *Downey* case against Humphreys who had merely participated in pretrial with Downey's counsel pursuant to 28 U.S.C. § 1407, but had not been a party to the later litigation.

[36] *See* note 12 *supra*.

[37] *See* note 2 *supra*.

[38] Judge Weinman stated in 350 F. Supp. at 766:

> This Court does not believe that the maxim that each man must

district court's treatment of *Humphreys*, "full and fair opportunity to litigate"[39] was not only supplanted by "full and fair opportunity to draw up the issues,"[40] but also the new standard was used to justify dropping the mutuality requirement for the party against whom collateral estoppel was asserted.

While the facts of the case suggest that it could have been reversed on appeal without disturbing the new standard espoused by the district court below, the Court of Appeals for the Sixth Circuit focussed primarily on the fact that Humphreys had not been a party to the prior action. An alternate ground for reversal might have centered around the fact that *Humphreys* was a tag-along case.[41] Although *Humphreys* was transferred five days before the first pretrial meeting, that transfer order was given almost four months after the original cases had been transferred.[42] Tag-alongs have been transferred even after all the other cases are set for trial.[43] Whether or not an individual litigant has been denied an equal opportunity to participate in pre-trial proceedings should be determined in each instance, but if the Sixth Circuit had desired to leave any life in the new standard used by the district court, it could have held that the danger to due process was simply too

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> be given his day in court is so inexorably fixed that it must mandatorily apply where a careful evaluation of the record of pretrial and trial proceedings in the prior action discloses that the absent party was given full and complete opportunity to ascertain and develop all relevant facts and to frame the issues during discovery and the liability issue was adjudicated at a trial conducted in an atmosphere free from errors in substantive, evidentiary and procedural law or trial strategy which if avoided would have changed the result.

[39] Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 955-56 (2d Cir. 1964); United States v. United Airlines, Inc., 216 F. Supp. 709, 725-26 (E.D. Wash., D. Nev. 1962).

[40] 350 F. Supp. at 766.

[41] Rule 1 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation defines a tag-along case as "a civil action apparently sharing common questions of fact with actions previously transferred under Section 1407 and which was filed or came to the attention of the Panel after the initial hearing before it." 53 F.R.D. 119, 120 (1971). Rule 12 provides for a conditional order of transfer to be made concerning a pending tag-along and the parties have 15 days to object to transfer before the conditional transfer order becomes effective.

[42] The original transfer order was on March 23, 1970, and *Humphreys* was transferred on July 10, 1970, five days before the first pretrial meeting. 487 F.2d at 667.

[43] *In re* Air Crash Disaster Near Pellston, Mich., 357 F. Supp. 1286 (J.P.M.L. 1973).

great when that standard was applied to tag-along cases. A second ground for reversing under these facts without attacking the "full and fair opportunity to draw up the issues" standard could have been that the *Downey* jury, while exonerating Tann, had a second party, TWA, on which to pin liability. On the other hand, the only defendant in *Humphreys* was Tann, and it certainly seems possible that the same jury would have assessed damages against Tann had there been no other defendant in *Downey*. Despite these alternative theories, the court of appeals invoked the broader ground that collateral estoppel may be applied only against one who was a party to the earlier action.[44]

The reversal of the district court's decision will be welcomed by those who have expressed criticism of application of section 1407 multidistrict litigation procedures to air crash cases.[45] Although some of the complaints have been remedied by modifications of the *Manual for Complex Litigation*,[46] some problems seem inherent in the consolidation process itself. Critics point out that often it is too costly and inconvenient for a plaintiff's attorney to travel to distant consolidated pretrial proceedings in order to participate fully.[47] The Judicial Panel on Multidistrict Litigation answers such objections to transfer based on attorney's cost by referring to the Manual's provisions for lead and liason[48] counsel, reliance on which reduces the need for travel.[49] Yet it is the very plaintiff who has been forced for practical economic considerations to rely on a discovery package provided by lead or liason counsel who argues

[44] 487 F.2d at 671.

[45] *See* Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORD. L. REV. 41, 49-50 (1971); McElhaney, *A Plea for the Preservation of the "Worm's Eye View" in Multidistrict Aviation Litigation*, 37 J. AIR L. & COM. 49 (1971). *See also* Beatty, *The Impact of Consolidated Multidistrict Proceedings on Plaintiffs in Mass-Disaster Litigation*, 38 J. AIR L. & COM. 183 (1972) and Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. & COM. 159 (1972).

[46] The Manual for Complex Litigation is produced by a Board of Editors of seven federal judges under the auspices of the Federal Judicial Center. It is intended to provide guidelines rather than binding rules for multidistrict procedure. The 1973 edition addressed itself to the early complaints concerning delays in discovery, unnecessary duplication in discovery, and more specific provisions concerning lead and liaison counsel. *See* Note, 87 HARV. L. REV. 1001, 1006-08 (1974).

[47] Beatty, *supra* note 45, at 187-88.

[48] MANUAL FOR COMPLEX LITIGATION §§ 1.90 & 1.92 (C.C.H. rev. ed. 1973).

[49] *In re* Grain Shipments, 364 F. Supp. 462, 462-63 (J.P.M.L. 1973).

most vehemently that his own attorney's "opportunity" to participate with the other attorneys in drawing up the issues was in fact minimal and that an estoppel based, as in *Humphreys*, on pretrial participation, is a denial of due process.[50]

Reliance on lead and liason counsel is not always necessary, however, and the urgent need to avoid constant repetition in the judicial process where identical fact situations exist suggest that collateral estoppel against non-parties should be determined on an *ad hoc* basis rather than under iron-clad rules. Some commentators suggest that non-parties should be bound in situations in which the traditional reasons for refusing to allow non-party estoppel are not pertinent and countervailing necessities for economizing judicial time are dominant.[51] The reasons usually given for denying the estoppel of a non-party are that he may have been precluded from making certain arguments, using certain strategies, or choosing his own attorney. Moreover, the interest of the party litigating the issue in the first suit may not have been as great as the non-party's and therefore the non-party may have presented his case more vigorously.[52] In *Humphreys*, however, the plaintiff's own attorney had participated in the fact-finding and issue-framing stages in the very suit that was litigated and could allege no errors or omissions made to his detriment.[53] The judge who had presided over the earlier proceeding determined that the most forceful case possible had been made against both the airlines by one of the nation's leading attorneys, and that it would be a travesty upon

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[50] During the Senate hearings on the adoption of the Multidistrict Litigation legislation, Senator Hugh Scott asked that a letter to him from Philip Price, Esquire, be made a part of the record. As an attorney experienced in multidistrict litigation, Mr. Price expressed concern for constitutional due process:

> As the number of cases and parties subject to mass handling increases, the attention and respect given the positions of the smaller parties or lesser interests in the litigation inevitably diminishes. Such mass proceedings may well raise substantial constitutional questions affecting, as they do, each litigant's right to have his case handled by his own counsel and his right to due process.

Hearings on S. 3815 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 96 (1967).

[51] Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357 (1974); Note, 87 HARV. L. REV. 1485 (1974).

[52] Note, 87 HARV. L. REV. 1485, 1496-97 (1974).

[53] *See* note 38 *supra*.

justice to have the issue relitigated.[54] A further consideration is the inherent unfairness of the multiple-plaintiff anomaly. If Tann had been found liable in *Downey*, Humphreys could have used that judgment to his benefit, yet the Court of Appeals refused to make the *Downey* judgment binding simply because it went the other way. By this reasoning, if Humphreys had sued both TWA and Tann, he could have used the *Downey* finding against TWA to his benefit while escaping the burden of the *Downey* exoneration of Tann. This type of unbalanced use of judicial decisions damages notions of legal symmetry and fairness and is magnified in situations that involve large numbers of plaintiffs. Under the facts in *Humphreys*, a substantial question arises of whether the interest of the non-party in not being estopped is as great as the interests of the forum and the defendant in estopping him. The costly burden of repeated litigation of the same issues when viewed in light of the non-party's connection with the first suit indicates that due process may have been satisfied for Humphreys in the first action.

Due process does not require particular forms or methods of procedure. It is satisfied if reasonable notice is provided and there is a reasonable opportunity to present claims, "due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."[55] What is in fact a reasonable procedure for due process purposes is determined by a balancing of the interests affected by the procedure.[56] This balancing process has not forbidden the estoppel of a non-party in all instances. Nonparties are estopped, for example, if their interests have been validly represented in a class action by a competent attorney.[57] Nonparties are also estopped if they are found to be in privity with an earlier party who litigated the issue.[58] Although the traditional notion of privity in this context contemplates an actual "successor

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[54] 350 F. Supp. at 766.

[55] Missouri *ex. rel.* Hurwitz v. North, 271 U.S. 40, 42 (1926).

[56] Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[57] Hansberry v. Lee, 311 U.S. 32, 41-42 (1940). That a class member is a non-party is the traditional statement, but in one sense a person who receives proper notice under Federal Rule of Civil Procedure 23(c)(2) and chooses not to exclude himself from the class, may be considered a party.

[58] *See* cases cited note 9 *supra.*

in interest"[59] relationship, and a mere interest in proving the same facts does not usually suffice,[60] a few recent decisions have attempted to expand the effect of privity to parties who had both a substantial connection with the earlier action and an identity of interest in the issue litigated.[61] While most of these decisions have either been overruled[62] or do not establish a clear rule for collaterally estopping a non-party,[63] there is undoubtedly a growing recognition

[59] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 128-29 (1912).

[60] *Id.*; Sodak Distrib. Co. v. Wayne, 775 S.D. 496, 93 N.W.2d 791, 795 (1958).

[61] *See* cases discussed in Vestal, *supra* note 51, and in Note, 87 HARV. L. REV. 1485.

[62] Makariw v. Rinard, 222 F. Supp. 336 (E.D. Pa. 1963), *rev'd*, 336 F.2d 333 (3rd Cir. 1964). In suit I, plaintiff automobile owner won damages against a corporate defendant for the negligence of the defendant's garage employee. In suit II the estate of the deceased employee sued the automobile owner who claimed collateral estoppel based on the victory in suit I as a defense. The Third Circuit, reversing, held that the employee's estate could not be bound without a day in court.

Vincent v. Peter Pan Bakers, Inc., 186 Neb. 206, 153 N.W.2d 849 (1967). A collision between two trucks occurred in which both drivers were killed. In suit I the personal representative of driver A won damages against the employer of driver B. In suit II the personal representative of driver B sued the employer of driver A, who claimed estoppel by reason of the judgment against driver B's employer in suit I. The trial court ruled that the first suit was conclusive. The Nebraska Supreme Court reversed under the circumstances but stated,

> It would seem to be entirely reasonable to allow preclusion against non-parties to suit I so long as they are adequately represented and protected in that suit. At this point there would seem to be a weighing process involved. Considered should be the saving of the time of the court, the adequacy of protection extended, and other relevant variable factors.

153 N.W.2d at 850. The court was actually quoting from Vestal, *Preclusion/ Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 59-60 (1964).

[63] Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir. 1967), *aff'g* 247 F. Supp. 851 (E.D. La. 1965), *cert. denied*, 389 U.S. 1009 (1967). A cemetery owner cleared brush from his cemetery, and forty-one relatives of decedents buried there filed claims for cemetery desecration. In suit I a judgment was rendered against the plaintiff, on a finding that no desecration had taken place. In suit II relatives of the plaintiff in suit I that had also testified as witnesses in the first action sued the cemetery owner. The same lawyer that litigated the first action represented the plaintiffs in suit II. Under Louisiana law a finding of desecration of any part of the cemetery would have established a claim for all the parties. The Fifth Circuit recognized that the Louisiana Civil Code required an identity of parties for application of res judicata, but nevertheless allowed estoppel of the plaintiffs in suit II on a Louisiana common-law concept of *judicial estoppel*. The court reasoned that since the plaintiffs in suit II admitted that they could present no new evidence which was not presented in suit I that they were judicially estopped.

Procter & Gamble Co. v. Byers Transp. Co., 355 F. Supp. 547 (W.D. Mo.

that full judicial proceedings should not be used as leverage by parties who have declined to join an earlier action concerning their interest.[64]

Whether or not non-party collateral estoppel develops in other areas of the law in which judicial efforts are needlessly duplicated, different efficiency mechanisms have evolved in air crash multi-district litigation proceedings which may make non-party collateral estoppel unnecessary. The purpose of section 1407[65] is to avoid repetitious discovery efforts and provide for the consolidation of common fact situations into a single pretrial proceeding. It provides for the remand of the transferred case to the district from which it was transferred, "at or before the conclusion of pretrial proceedings, *unless it shall have been previously terminated*."[66] It has been determined, however, that a summary judgment in the transferee court is a valid part of the pretrial proceedings and qualifies within the phrase "unless it shall have been previously

1973). In suit I a number of carriers had unsuccessfully attacked the validity of refund orders issued by the Interstate Commerce Commission. In suit II the plaintiff shipper, suing various carriers for the refund, alleged that the judgment against the carriers in suit I was conclusive. The court noted that it was "not clear whether all of the defendants in this action were plaintiffs in the [earlier] action." *Id.* at 556. Estoppel was allowed however, on the basis that the defendants had admitted in their answer to have been parties to the earlier proceeding, and that their interests had all been jointly served therein.

Colditz v. Eastern Airlines Inc., 329 F. Supp. 691 (S.D.N.Y. 1971). In suit I crew members of an Eastern Airlines plane sued Trans World Airlines and the United States for injuries arising out of a collision. The defendants impleaded Eastern Airlines. There was a jury verdict for Trans World Airlines and the trial judge exonerated the United States and dismissed Eastern Airlines. In suit II, passengers of the Eastern plane sued both Trans World Airlines and Eastern Airlines. Before trial the defendants moved to estop the passengers on the basis of suit I, but the court denied on traditional due process grounds. After the plaintiff's case was presented the defendants again moved for estoppel but the court ruled that the passengers were entitled to rely on res ipsa loquitur and thus should be allowed the benefit of any evidence which the defendants might show against each other. The defendant airlines then declined to present evidence and moved once again for application of estoppel. The court then granted estoppel for Trans World Airlines since there was no evidence to contradict the evidence presented in suit I, but denied it for the benefit of Eastern Airlines because there had been no findings with respect to Eastern in suit I that were necessary to the judgment reached in that action. Although the estoppel in favor of Trans World Airlines resulted from a balance of the evidence given in suit I with no evidence presented in suit II, the decision of the jury in suit I had a preclusive effect.

[64] Vestal, *supra* note 51, at 374.

[65] *See* notes 1 & 2 *supra.*

[66] 28 U.S.C. § 1407(a) (1970) (emphasis added).

terminated."[67] Actually, the great majority of cases transferred under section 1407 that are not terminated by a summary judgment are never remanded but are disposed of in the transferee court.[68] The parties may stipulate to be bound by a test case,[69] or the transferee judge may bring the cases under his jurisdiction for all purposes under 28 U.S.C. § 1404 (a)[70] rather than solely for pretrial proceedings under section 1407.[71] Section 1404 (a) states in pertinent part:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The transfer for all purposes under Section 1404 (a) is limited to those cases which could have been brought originally in the transferee district,[72] but that limitation is not placed on section 1407 pretrial consolidations.[73] This distinction means that if jurisdiction and venue are improper in the district to which the cases are

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[67] Reidinger v. Trans World Airlines, Inc., 463 F.2d 1017 (6th Cir. 1972).

[68] *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1017 (1974).

[69] McDermott, *A Plea for the Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. AIR L. & COM. 423, 431-37 (1971).

[70] 28 U.S.C. § 1404(a) (1970) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

[71] Rule 15 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation was amended in 1972 to read in part:

> Each transferred action in the transferee court that has not been terminated in the transferee court will be remanded to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge transfers an action under 28 U.SC. §§ 1404(a) or 1406, an order of remand shall not be necessary to authorize further proceedings including trial.

55 F.R.D. LI, LI-LII (1972).

For case discussion of § 1404(a) transfers, *see In re* Silver Bridge Disaster, 311 F. Supp. 1345, 1346 (J.P.M.L. 1970), and Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971).

[72] 260 F.2d 317, 320-21 (7th Cir. 1958), *aff'd* 363 U.S. 335 (1960).

[73] The criteria for § 1407 transfer is stated in § 1407(a):

> [T]ransfers shall be made by the . . . panel . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action.

transferred, the section 1407 consolidated pretrial proceedings may be completed, but the cases may not be subsequently retained for full disposition under section 1404 (a).

In air crash disasters, however, the transferee district is usually chosen where the site of the crash is located,[74] so that venue and jurisdiction are proper[75] and section 1404 (a) may be invoked by the transferee judge to allow for full disposition.[76] Although the original function of section 1407 was limited to pretrial proceedings,[77] it is now recognized that since the actions may be transferred by the transferee judge under section 1404 (a), the practical result of a section 1407 transfer of air crash cases is a transfer for all purposes.[78] The transferee judge may then invoke rule 42 (a) of the Federal Rules of Civil Procedure, which provides:

> CONSOLIDATION. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Thus, through the interplay of sections 1407 and 1404 (a) with rule 42(a), the transferred actions may be consolidated into one trial. Another method for a more economical usage of judicial machinery in mass disasters may be the class action. Although the legislative history indicates that the class action procedure was not

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[74] *In re* Air Crash Disaster at Tweed-New Haven Airport, 343 F. Supp. 951, 952 (J.P.M.L. 1972), and cases cited therein.

[75] Almost any long-arm statute would allow exercise of jurisdiction, and venue is proper pursuant to 28 U.S.C. § 1391(a) and (b) (1970), "in the judicial district . . . in which the claim arose."

[76] *See* note 71 *supra.*

[77] The House Judiciary Committee stated that "the bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. H.R. Rep. No. 1130, 90th Cong., 2d Sess. (1968), *reprinted in* U.S. CODE CONG. & AD. NEWS 1898, 1900 (1968). A proposal was rejected that was designed to amend § 1407 by adding a § 1408 which would have given the Judicial Panel on Multidistrict Litigation the authority to transfer for pretrial *and* trial. *See Hearing on S. 961 Before Subcomm. on Improvements in Judicial Machinery of State Comm. on Judiciary,* 91st Cong., 1st Sess. 207 (1969).

[78] Harris, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. § 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. § 1404(a),* 22 HAST. L.J. 1289, 1326 (1971).

intended to be applied to mass torts,[79] it is often suggested that it is especially useful in an air crash situation where all the cases are identical and there are not individual defenses against each plaintiff on the liability issue.[80] With these efficiency mechanisms available, the necessity of collaterally estopping a non-party as in *Humphreys* seems less pressing in air crash disasters.

Humphreys v. Tann was a passing episode in the struggle to administer justice in the most efficient way possible without infringing on the requirements of due process. The appellate reversal restrained the increasing trend toward adopting efficiency measures, and the opinion seemed to echo the philosophy of Jeremy Bentham who cautioned against placing too much emphasis on efficiency even though he also was an early critic of the strict mutuality of estoppel requirement:

> One is tempted, however, to ask, whether justice be a thing worth having, or no? and if it be, at what time is it desirable that litigation should be at the end? after justice is done, or before?[81]

But there are those who contend that justice *is* done when certain factors indicate that a party has had such a substantial connection with the previous litigation as to have had a "vicarious" day in court.[82] As a leading commentor on the principles of *res judicata* has recently stated in support of certain uses of non-party estoppel,

> The courts seem to indicate an unwillingness to "play games." There is a reluctance to allow courts and lawyers to go beyond decision-making and engage in proceedings that are seen as repetitious and nothing more than a method by which lawyers are kept

[79] The Advisory Committee's Note to the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure states:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

39 F.R.D. 69, 103 (1966).

[80] Petition of Gabel, 350 F. Supp. 624, 627 (C.D. Cal. 1972), *noted in* 40 J. AIR L. & COM. 320 (1974). *See also* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1783 (1972).

[81] J. BENTHAM, *The Rationale of Judicial Evidence*, in 7 WORKS OF JEREMY BENTHAM 1972 (Bowring ed. 1838-1843).

[82] Note, 87 HARV. L. REV. 1485, 1504 (1974).

> busy and courts are kept crowded, and which serve no socially desirable end. In fact, repetitive proceedings are seen as socially destructive—something which should not be allowed.[83]

It must not be forgotten that the balancing of traditionally accepted due process requirements with the quest for judicial economy is itself a process, the very goal of which is to attain justice. Useless relitigation of identical facts and issues is contrary to the very notion of justice, for delay, if acute enough, will destroy any possibility for justice no matter what procedures are followed. This applies to the litigants at bar as well as to those who await the precious facilities. If the other efficiency mechanisms available in air crash disaster litigation prove insufficient, non-party estoppel should be applied under standards which balance the interest of the individual with the interests of society and maintain the purpose of achieving an optimum level of neither efficiency nor due process—but justice. With the reversal of *Humphreys* on appeal, the collateral estoppel precedents remain unchanged, but *Humphreys v. Tann* provides a useful insight into the judicial approach to the perplexing problem of mass disaster litigation.

Gary Crapster

AIR TRANSPORTATION—INTRASTATE CARRIERS—A Purely Intrastate Carrier is Not Within the Jurisdiction of the CAB; Such Regulatory Power Belongs to the States. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3345 (U.S. Dec. 16, 1974).

For many years the cities of Dallas and Fort Worth were engaged in an intense rivalry for the business of commercial air carriers, and each city consequently constructed its own airport. In 1962 the Civil Aeronautics Board (CAB)[1] instituted an investiga-

[83] Vestal, *supra* note 51, at 374.

[1] The CAB had jurisdiction in this subject by virtue of the fact that it could have amended the carriers' certificates of public convenience and required them to fly out of Love Field or a Fort Worth airfield. Therefore, to eliminate the uncertainty of which airport would be selected, the cities agreed to build DFW.

tion[2] that resulted in a 1964 interim order giving the cities 180 days to arrive at a voluntary agreement to designate a single airport to serve the area. If they could not reach an agreement, the CAB would amend the certificates of the interstate carriers and require them to serve either Dallas Love Field or Fort Worth's airport, Great Southwest International Airport.[3] The cities agreed to construct a new airfield and all interstate CAB-certified carriers agreed to move to the Dallas-Fort Worth Regional Airport (DFW) upon its completion. Southwest Airlines, an intrastate commuter line certificated by the Texas Aeronautics Commission (TAC)[4] to serve Love Field, refused to move and was directed by the TAC to continue services there until told to do otherwise.[5] At trial before the United States District Court for the Northern District of Texas, the cities argued that the CAB interim order of 1964 required them to transfer all certificated air carrier services to the new regional airport, including those of Southwest Airlines.[6] Since Love Field has received substantial federal assistance[7] it must be available for public use without unjust discrimination.[8] The problem, therefore, is the determination of who will make these "just" discriminations by use-classification.[9] The United States District Court for the

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[2] Dallas-Fort Worth Texas Regional Airport Investigation, CAB Doc. No. 13959 (1962).

[3] City of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015, 1020 (N.D. Tex. 1973).

[4] TAC has been given the unqualified authority to regulate scheduled intrastate carriers. It is to consider the development of intrastate air transportation which can properly be adapted to the needs of Texas. The TAC is to issue certificates of public convenience only after it has considered, among other things, the effect it will have on CAB certified carriers. Municipal Airports Act, TEX. REV. CIV. STAT. ANN. art. 46c (1969).

[5] 371 F. Supp. at 1021.

[6] *Id.*

[7] In 1917 the United States Government established Love Field for the training of Air Force personnel. In 1941, the City of Dallas received $387,898 from WPA for improvements at Love Field and bound itself to the federal government by stating that it would devote the project to the public use without discrimination. *See* Resolution of the City of Dallas (June 10, 1963). In 1950 and 1951 the City of Dallas received money from CAB to acquire land and for other purposes. *See* CAB Project No. 9-41-106-001 (1950); CAB Project No. 9-41-106-102 (1951).

[8] 49 U.S.C. § 1718(1) (1970).

[9] City of Dallas v. Southwest Airlines Co., 494 F.2d 773, 776 (5th Cir. 1974). The District Court considered several issues in this case. The Fifth Circuit narrowed these issues to two: (1) Unjust discrimination and (2) the jurisdiction

Northern District of Texas found that the CAB has no jurisdiction over a purely intrastate airline, and that regulatory power over Texas intrastate air carriers belongs solely to the TAC. *Held, affirmed*: Southwest need not obtain a certificate from the CAB, and the states have the power to act so long as there is no conflict with federal law. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974),*aff'g* 371 F. Supp. 1015 (N.D. Tex. 1973), *cert. denied*, 43 U.S.L.W. 3345 (U.S. Dec. 16, 1974).

In affirming the decision of the United States District Court, the United States Court of Appeals for the Fifth Circuit endorsed a Texas Supreme Court decision which stated that in all matters of flying safety, Southwest Airlines would be regulated by the Federal Aviation Agency (FAA), but that Congress has not preempted the field of economic regulation of air carriers and Southwest therefore need not obtain a certificate from the CAB.[10] Furthermore, the decision as to where the public interest lies and what air service is best for Texas must be made by the TAC.[11]

The decision is supported by other cases dealing with the power of the states to regulate intrastate activities.[12] There have been no unequivocal decisions of the United States Supreme Court defining the limits of state regulatory control. Any doubts on the subject, however, should be resolved in favor of state power.[13] In *Southwest*, the Fifth Circuit and the district court both found in favor of state power to regulate intrastate carriers, despite the assertion that since Southwest Airlines' activities adversely affect interstate carriers, it is necessary that Southwest obtain a certificate from the CAB.[14] Of course, the power of Congress to regulate interstate

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of the CAB. Of these two issues the most important and continually recurring problem is that of the jurisdictional limits of the CAB.

[10] Texas Aeronautics Comm'n v. Braniff Airways, Inc., 454 S.W.2d 199, 200 (Tex. 1970).

[11] *Id.* at 201.

[12] People v. Western Air Lines, Inc., 42 Cal. 2d 621, 268 P.2d 723 (1954); Texas Int'l Airlines, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972). *See* Sheppard, *State-Federal Economic Regulation of Commercial Aviation*, 47 TEXAS L. REV. 275 (1969).

[13] People v. Western Air Lines, Inc., 42 Cal.2d 621, 268 P.2d 723, 737 (1954).

[14] Texas Int'l Airlines, Inc. v. CAB, 473 F.2d 1150 (D.C. Cir. 1972); Texas Aeronautics Comm'n v. Braniff Airways, Inc., 454 S.W.2d 199 (Tex. 1970); *see* the Court of Civil Appeals decision of this case as noted in 35 J. AIR L. & COM. 663 (1969).

commerce is complete, and all commercial aviation arguably affects interstate commerce to the extent necessary under the commerce clause to justify exclusive federal regulation.[15] Even though Congress has exerted power in various areas to the extent of regulating intrastate activities which adversely affect interstate commerce,[16] the CAB has ruled that its economic regulatory power:

> does not include common carriage which 'affects' commerce between the states . . . [T]he generally accepted opinion has always been that purely intrastate operations are beyond the reach of the power conferred on the Board by the Act even where such operations may be thought to burden interstate commerce by reason of their adverse economic impact on interstate air carriers.[17]

It appears that the CAB has exerted its jurisdictional authority over intrastate activities which are wholly within the geographical limits of a single state if it appears that the intrastate activity is actually related in some way to interstate travel.[18] Notwithstanding this, the Board is presently willing to acquiesce in state authority until such an interstate-related activity occurs.

In *City of Dallas v. Southwest Airlines Co.*, the cities expressed concern that Southwest's continued presence at Love Field would induce the CAB-certificated carriers to maintain services there and that there would result a loss of revenue at the new DFW airport. A retention of services by Southwest and these other carriers at Love Field would result in a significant impact on the financial security of the Regional Airport.[19] Nevertheless, the district court's rejection of this argument was affirmed by the United States Court

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[15] Sheppard, *supra* note 12.

[16] *See* Wickard v. Filburn, 317 U.S. 111 (1942), in which the Court said ". . . no form of state activity can constitutionally thwart the regulatory power by the commerce clause to Congress" . . . and such power . . . "extends to these intrastate activities which in a substantial way interfere with . . . the exercise of the granted power." *Id.* at 124. *See also* Katzenbach v. McClung, 379 U.S. 294 (1964); Colorado v. United States, 271 U.S. 153 (1962). "Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce." *Id.* at 163. *See also* Houston, E. & W. Tex. R.R. Co. v. United States, 234 U.S. 342 (1941), where the Court said, "Interstate trade was not left to be destroyed or impeded by the rivalries of local government." *Id.* at 350.

[17] CAB Order No. 71-6-79 (June 15, 1971).

[18] *See* CAB v. Friedkin Aeronautics, Inc., 246 F.2d 173 (9th Cir. 1957).

[19] City of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015, 1025 (N.D. Tex. 1973).

of Appeals for the Fifth Circuit, and the CAB has consistently refused to exert its jurisdiction over Southwest even in the face of such revenue losses.[20] In earlier cases dealing with federal administrative agencies' power over intrastate activities, the courts have upheld an agency's jurisdiction even where the agency itself had held it had no jurisdiction.[21] That is, when confronted with the fear that an activity not within the agency's jurisdiction might have a serious financial impact on and create substantial competition for activities within the agency's regulatory power, the Supreme Court has held that it was not Congress' intent to prohibit administrative action to achieve the agency's ultimate purpose.[22] There can be no doubt, therefore, that the CAB could assert jurisdiction over Southwest Airlines due to the potential financial and competitive impact Southwest would have on the other airlines within the agency's jurisdiction. Notwithstanding the possibility of CAB jurisdiction, the court in *Southwest* was correct.

While the jurisdiction established by the Federal Aviation Act over safety matters is broad and has been asserted over all air operations that directly affect interstate commerce,[23] the jurisdiction established for purposes of economic regulation has not been so broadly construed or applied.[24] The economic regulations which require CAB certification apply only to air transportation.[25] Air transportation is defined by the Act as interstate air transportation.[26] Interstate air transportation is further defined as the carriage of persons for compensation or the carriage of mail by aircraft in commerce between a place in any state of the United States

[20] It should be noted that since Southwest's refusal to leave Love Field, "despite its contract, Braniff has refused to close operations from Love and Texas International has now reopened there under the umbrella of a state court injunction." 494 F.2d 773, 775 n.1 (5th Cir. 1974). Twenty-five percent (25%) of Texas International's business is in and out of Dallas. Texas International's (T.I.) President has stated that if T.I. is denied the use of Love Field, while other airlines are permitted to use it, T.I. will lose the commuter market between certain points. *See* Brief for Appellee at 9, the Fifth District Court of Appeals of Texas, Docket No. 18377.

[21] *See* Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

[22] United States v. Southwestern Cable Co., 392 U.S. 157 (1967).

[23] Rosenhan v. United States, 131 F.2d 932 (10th Cir. 1942); United States v. Drumm, 55 F. Supp. 151 (D. Nev. 1944).

[24] Sheppard, *supra* note 12, at 276.

[25] 49 U.S.C. § 1371(a) (1970).

[26] 49 U.S.C. § 1301(10) (1970).

and a place in any other state.[27] Judicial interpretation of these provisions has emphasized that "nothing in this definition is directed at activities which merely affect interstate commerce."[28] Since air commerce is defined in the same provision of the Act as "any operation of aircraft within the limits of any Federal Airway . . . which directly affect, or which may endanger safety in, interstate . . . air commerce,"[29] it would seem that the absence of similar language in the definition of air transportation was intentional.[30] The affirmation of the district court's decision by the United States Court of Appeals for the Fifth Circuit in *Southwest* is thus correct in that Southwest Airlines should not be required to obtain a certificate from the CAB simply because its activities affect interstate carriers.

The United States Supreme Court early upheld an expansive view of federal agency jurisdiction to carry out its ultimate purposes despite the agency's inability to base its action on some specific provision of the congressional act.[31] The appropriate rule here is that a grant of general rule-making power for enforcement purposes should be extended only in situations in which there are no specific provisions dealing with the activity concerned.[32] In the provisions of the Federal Aviation Act of 1958, Congress has specifically granted the CAB broad regulatory jurisdiction over any activity which *affects* interstate *safety* operations[33] and has deliberately withheld from the CAB broad regulatory jurisdiction over economic matters. That is, statutory stipulations for CAB jurisdiction are specifically included in the safety regulatory provisions but no

[27] 49 U.S.C. § 1301(21) (1970).

[28] Texas Int'l Airlines, Inc. v. CAB, 473 F.2d 1150, 1152 (D.C. Cir. 1972).

[29] 49 U.S.C. § 1301(4) (1970).

[30] Texas Int'l Airlines, Inc. v. CAB, 473 F.2d 1150, 1152 (D.C. Cir. 1972); *See* CAB v. Island Airlines, 235 F. Supp. 990 (D. Hawaii 1964). In that case, the court observed that the CAB would have no control over intra-Hawaii operations not involving flight over the channel waters separating the islands. *Id.* at 1007. The CAB has stated that transportation by an airline within a state would not be within the CAB's jurisdiction, but for very special circumstances (*i.e.* flight outside the states for more than 2 minutes). CAB Order No. E-23958 (July 15, 1966).

[31] *See* United States v. Pennsylvania R.R. Co., 323 U.S. 612 (1945), and cases cited notes 18 & 19 *supra.* These cases can be distinguished from *Southwest* in that the activities of Southwest are deliberately excluded from the Board's jurisdiction.

[32] *Cf.* American Trucking Ass'n v. United States, 355 U.S. 141 (1957).

[33] 49 U.S.C. §§ 1302(3) and 1304(4) (1970).

corresponding stipulations are provided in the economic regulations portion of the Act.

Even though the House Report on the Civil Aeronautics Act of 1938[34] suggested that a narrow construction of the Act's terms was not contemplated,[35] the United States Supreme Court has hesitated to hold that the Act has completely displaced all other existing regulatory bodies.[36] In *Pan American World Airways v. United States, Inc.*,[37] the Supreme Court, in dealing with the question of whether the Civil Aeronautics Act[38] was designed to completely displace the antitrust laws, refused to hold that "the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocal declared congressional purpose so to do."[39] The Court in *Pan American* concluded that the Justice Department had not lost complete jurisdiction to enforce certain antitrust violations.[40] Therefore, it is apparent that there is perhaps enough latitude within the Act itself as well as its legislative history to give the CAB jurisdiction over Southwest. However, these Supreme Court decisions indicate that the Court is not willing to extend jurisdiction to the CAB in matters which are not unequivocally provided for in the Act. Consequently, the Fifth Circuit Court of Appeals decision in *Southwest* is correct in concurring with the Texas Supreme Court that "regulatory power over Texas intrastate Air Carriers [is] . . . reposed with the State of Texas,"[41] and that "this constitutes Texas' exercise of its power to determine

[34] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938), *re-enacted as* Federal Aviation Act of 1958, 72 Stat. 731 (1958), *as amended*, 49 U.S.C. § 1301 *et. seq.* (1970).

[35] H.R. REP. No. 2254, 75th Cong., 3d Sess. 1 (1938) states:

> It is the purpose of this legislation to coordinate in a single independent aegncy all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air transportation industry in the United States.

[36] *See* Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); *cf.* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

[37] 371 U.S. 296 (1963).

[38] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938), *re-enacted as* Federal Aviation Act of 1958, 72 Stat. 731 (1958), *as amended*, 49 U.S.C. § 1301 *et. seq.* (1970).

[39] 371 U.S. 206, 305.

[40] *Id.*

[41] 494 F.2d 773, 776 (5th Cir. 1974).

that Southwest's is not an improper use of Love Field."[42]

The practical impact of the Fifth Circuit's decision in *Southwest* is significant in that Southwest Airlines may stay at Love Field and actively compete for Dallas passengers with the federally-regulated airlines who may only use the less conveniently located airport, DFW. It has been suggested that intrastate operators should supplement, rather than compete with, federally regulated interstate air transportation.[43] Since our entire economic structure is founded upon the theory of free enterprise, the better reasoning would be to allow competition with federally regulated carriers since the increased competition would provide a better and cheaper air service on intrastate routes.[44] The public is concerned with the operation and regulation of air travel in two broad areas. The major concern is safety. The public policy of insuring flying safety is therefore uniformly regulated by the federal government.[45] The second area of concern is economics; the public must look to private enterprise for public transportation. The users of air transportation, "the travelers and the shippers, are interested in more, better, . . . and cheaper transportation and regulatory policy should be directed to the promotion of these goals."[46]

Regulation of the aviation industry occurs at three levels of government, federal, state and local. Conflicting regulations should be avoided and the courts should establish, from the earliest possible moment, which regulatory agency of which governmental level will govern so that inconsistent and burdensome regulations will not endanger the air transportation field. *Southwest* is an indication that the courts are not going to interfere, and it appears that only congressional legislation can create a uniform federal regulatory system. Even without legislation, however, the power of Congress to promote, protect, and regulate interstate air commerce and transportation is complete and clear. Congress may exert this pow-

[42] *Id.* at 777.

[43] *See* S. REP. No. 1661, 75th Cong., 3d Sess. 2 (1938) where it is stated:

> Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest. . . .

[44] Sheppard, *supra* note 12, at 293.

[45] *See* note 23 *supra.*

[46] Ryan, *Economic Regulation of Air Commerce by the States*, 31 VA. L. REV. 479, 507 (1945).

er to the broadest extent possible even though its exercise affects intrastate activities which would otherwise be within the control of the state.[47] In *Wickard v. Filburn*,[48] the United States Supreme Court held that even though an activity may be local in nature it can be reached by Congress if it has an economic effect on interstate commerce. Notwithstanding this power, *Southwest* indicates that the court and Congress are not yet willing to extend the economic power of the CAB to regulate purely intrastate air transportation. This unwillingness is the proper resolution of the issue because exclusive federal regulation of air commerce could create an undesirable precedent that could lead to the impairment of state regulatory control in various other public utility fields.[49] Furthermore, the adoption of an exclusive federal regulation "is considered by many to be repugnant to the Constitutional concept of state sovereignty and the reserved powers of the states."[50]

As metropolitan areas continue to grow together and more convenient and centrally located airports are required, the significance of *Southwest* will increase. *Southwest* indicates that the states have the power to regulate the economic matters of purely intrastate air carriers, even if those air carriers actively and successfully compete with CAB-regulated carriers. The states' power to regulate intrastate carriers is recognized even if new metropolitan airports face significant revenue losses as does the DFW Regional Airport, the airport involved in *Southwest*.

It is possible that if state regulatory power expands to the point that competition between intrastate and interstate carriers is grossly unequal,[51] the courts and Congress will exert their potential jurisdiction and affirmatively act to curtail the state power. For the present time, however, the states will be allowed to determine mat-

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[47] *Id.* at 502; *see also* People v. Western Air Lines, Inc., 42 Cal.2d 621, 268 P.2d 723 (1954).

[48] 317 U.S. 111 (1942).

[49] Ryan, *supra* note 46, at 505.

[50] *Id.*

[51] It is important to note that Southwest, and airlines that may develop who will be in a similar situation, perhaps at this time have an unfair advantage. That is, Love Field is conveniently located for residents of the Dallas downtown business community who fly within Texas. DFW is approximately 45 minutes away from the downtown area. Therefore, it seems logical that people flying intrastate will use Love Field. Nevertheless, the courts and Congress are presently willing to acquiesce and allow such competition.

ters of public convenience in economic regulations of intrastate carriers. *Southwest* indicates that state regulatory bodies will not only be allowed to supplement federally regulated routes, but will be allowed to compete with the existing CAB-certificated airlines. That is, *Southwest* indicates that purely intrastate operations are beyond the reach of the power conferred on the CAB even where such operations may burden interstate commerce due to the adverse economic impact on interstate air carriers. Beyond this, *Southwest* establishes a precedent, not heretofore considered by the courts or Congress, which deals with the exanding metropolitan areas. Metropolitan regional airports are not a thing of the future, but are now a present day reality. As individual city airports are closed down and metropolitan airports are built, the CAB will continue to possess the power of amending interstate carriers certificates and therefore require such carriers to move to less convenient locations. *Southwest* asserts that the CAB cannot amend the intrastate carriers' certificates, which results in allowing the commuter carriers to retain a majority of the short-haul intrastate passenger services. Not only will this result have an adverse impact on the CAB-regulated carriers, but it could have an equally adverse impact on the success of new metropolitan airports.

Michael L. Farley

ADMIRALTY TORT JURISDICTION—MARITIME NEXUS —An Amphibian Plane Crash Into Harbor Waters Has a Sufficient Maritime Nexus to Support Admiralty Tort Jurisdiction When the Crash Occurs During the Takeoff Phase of the Flight, or Alternately, When the Flight is to be Primarily Over the High Seas Between Two Territorial Islands. *Hark v. Antilles Airboats, Inc.*, 355 F. Supp. 683 (D.V.Is. 1973).

Hark was a passenger on one of defendant's amphibious airplanes on a flight between two of the Virgin Islands. The flight path was primarily over the high seas beyond the territorial jurisdiction of the Islands. Shortly after takeoff from the waters of an island harbor, but before minimum control speed could be attained, one

of the two engines failed, and the airplane crashed into the harbor waters.[1] The statute of limitations on his common law tort action had already run when Hark decided to bring an action to recover for injuries allegedly sustained in the crash. Hark therefore brought his action in admiralty for a maritime tort,[2] which is only limited by the flexible doctrine of laches.[3] Defendant moved for judgment on the pleadings and for summary judgment, maintaining that the underlying claim was preeminently for an aviation tort that was not cognizable in admiralty.[4] *Held, motion denied*: An amphibious airplane crash into harbor waters has a sufficient maritime relationship to support admiralty tort jurisdiction when the crash occurs during the takeoff phase of the flight before minimum control speed is attained, or, alternatively, when the flight is to be primarily over the high seas between two islands. *Hark v. Antilles Airboats, Inc.*, 355 F. Supp. 683 (D.V.Is. 1973).

The admiralty jurisdiction of the federal courts is grounded in article III, section 2 of the Constitution, which states that "[t]he Judicial Power of the United States shall extend to . . . all Cases of admiralty and maritime Jurisdiction." In its original implementation of this constitutional grant of jurisdiction to the federal courts, Congress made no attempt to define the scope of admiralty jurisdiction. The Judiciary Act of 1789 merely provided:

> The district courts shall have original jurisdiction exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction. . . .[5]

The federal courts have thus been left with broad discretion in fixing the boundaries of admiralty jurisdiction, although Congress

[1] Hark v. Antilles Airboats, Inc., 355 F. Supp. 683, 684 (D.V.I. 1973).

[2] Hark also pleaded two other theories of recovery: breach of an implied warranty of airworthiness and breach of a contract for safe carriage. *Id.* at 685. The court held that a breach of warranty action should be brought against the manufacturer or its distributors, rather than an airline. *Id.* at 688. The court also dismissed the breach of contract count, holding that personal injury is preeminently a tort claim and should not be allowed to be brought in contract. *Id.* at 689.

[3] *Id.* at 685. Admiralty courts rely on the concept of "unreasonable delay" rather than on a definite period of limitation, but as a matter of convenience they look to the analogous local statute of limitations to determine what a reasonable delay would be. *See* Morales v. Moore-McCormack Lines, Inc., 208 F.2d 218 (5th Cir. 1953).

[4] 355 F. Supp. at 685.

[5] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, *as amended*, 28 U.S.C. § 1333 (1970).

has on occasion altered the judicial determination of the statutory scope of admiralty jurisdiction.[6]

The Supreme Court's most recent and comprehensive pronouncement on the scope of admiralty tort jurisdiction was made in *Executive Jet Aviation, Inc. v. City of Cleveland.*[7] In *Executive Jet* a jet aircraft that had been chartered to fly from Cleveland, Ohio to White Plains, New York via Portland, Maine collided with a flock of sea gulls seconds after takeoff from Burke Lakefront Airport. The gulls were ingested into the aircraft's engines resulting in an immediate loss of power. The aircraft settled just off shore in Lake Erie after striking the airport perimenter fence and a pick-up truck. Federal admiralty jurisdiction was invoked by the owners of the plane in a suit to recover damages for the loss of the plane. The alleged negligence consisted of a failure to keep the runway clear of seagulls. The Supreme Court reviewed a long line of cases that had held that admiralty jurisdiction over torts depended solely on the "locality" of the tort; that is, if the tort occurred on or over navigable waters, the tort was cognizable in admiralty.[8] Since an aircraft is able to move rapidly from a position over land to a position over water or vice versa, the locality of an aviation tort is extremely difficult to determine in many cases and involves distinctions which admiralty law is ill-equipped to handle.[9] For this reason the Supreme Court concluded that a test of admiralty tort jurisdiction based on "locality alone" was inappropriate for aviation torts, and held that:

> 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. . . . [U]nless such a relationship exists,

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[6] For example, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1970), extended admiralty tort jurisdiction to cases where damage to persons or property on land was caused by a vessel on navigable water, thereby overruling the result in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), where the Court held that a suit brought to recover for damage to a wharf and several warehouses caused by a fire that began on a ship anchored near the wharf on navigable waters was not cognizable in admiralty.

[7] 409 U.S. 249 (1972), *noted in* 39 J. AIR L. & COM. 625 (1973).

[8] 409 U.S. at 253-55. *See, e.g.*, The Plymouth, 70 U.S. (3 Wall.) 20 (1866); Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963) (wrongful death action arising out of an airplane crash into Boston Harbor held to be cognizable within admiralty).

[9] 409 U.S. at 268.

> claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.[10]

Thus, *Executive Jet* established maritime locality plus maritime nexus[11] as the test of admiralty jurisdiction in aviation tort cases.

In discussing what kind of relationships to traditional maritime activity would be considered significant, the Supreme Court weighed the petitioner's argument that a downed plane was analogous to a sinking ship and, therefore, any aircraft crash into navigable waters satisfied the maritime relationship requirement.[12] The dissenting opinion in the Sixth Circuit's disposition of the *Executive Jet* case made the same argument for the following reasons:

> Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings upon land. . . . In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers.[13]

The Supreme Court rejected this argument, finding that admiralty law was molded to handle problems of waterborne vessels and to deal with navigational rules that are

> wholly alien to air commerce, whose vehicles operate in a totally different element. . . . The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water.[14]

The differences between waterborne vessels and aircraft in terms of the conceptual expertise of the law to be applied far outweigh the superficial similarities between a downed plane and a sinking ship. In particular, the causes of an airplane crash into navigable waters, such as negligent aircraft manufacture or maintenance, are almost invariably unrelated to the sea. Consequently, liability will depend on "conceptual inquiries unfamiliar to the law of admiralty."[15] for these reasons the Court concluded that the mere fortuity

[10] *Id.*

[11] Maritime nexus is used as a shorthand expression for the requirement in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), that the wrong bear a significant relationship to traditional maritime activity.

[12] 409 U.S. at 268.

[13] 448 F.2d 151, 163 (6th Cir. 1971) (dissenting opinion). *See also* Weinstein v. Eastern Airlines, Inc., 316 F.2d 758, 763 (3d Cir. 1971).

[14] 409 U.S. at 270.

[15] *Id.*

of an aircraft crash into navigable waters was insufficient to meet the maritime nexus requirement,[16] and held that, in the absence of legislation to the contrary, tort claims arising out of flights by land-based aircraft between points within the continental United States could never support federal admiralty jurisdiction.[17] The Court,, however, expressly reserved the question of whether, under any circumstances, an aviation tort could have a sufficient maritime nexus to support admiralty jurisdiction.[18]

"As if guided by a malign intelligence,"[19] the aviation accident in *Hark* fell precisely into the uncertain area[20] left by the Supreme Court's decision in *Executive Jet.* The flight in *Hark* was to have been over international waters between two territorial islands by an amphibious airplane, rather than between two points within the continental United States by a land-based airplane, as in *Executive Jet.* Consequently, the district court was faced with the question of whether, at least under the circumstances of the crash in *Hark,* an aviation tort could bear a sufficient relationship to traditional maritime activity to support admiralty jurisdiction.

Before this question could be decided, however, it was first necessary to determine what standard should be used to weigh the sufficiency of an alleged maritime relationship. As the district court in *Hark* pointed out, the purpose of the maritime nexus requirement was to screen out matters that were beyond the competence of admiralty,[21] thereby allowing admiralty law to be invoked only when its expertise was relevant.[22] Thus, the *Hark* court apparently recognized that the sufficiency of an alleged maritime relationship must be determined in each case in accord with the relevance of admiralty expertise to the substantive issues of the case.[23]

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[16] *Id.* at 270-71.

[17] *Id.* at 274.

[18] *Id.* at 271.

[19] 355 F. Supp. at 685.

[20] *I.e.,* aviation torts occurring during either flights by amphibian planes or sea planes, or flights to or from a point outside the continental United States.

[21] 409 U.S. at 256.

[22] 355 F. Supp. at 686.

[23] *Cf.* Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), where the Fifth Circuit held that rifle fire, which was directed from shore at a small vessel on the Mississippi River and which injured the pilot, presented sufficient danger to maritime commerce to override any state interests in the case; therefore, a federal court of admiralty properly assumed jurisdiction. The Fifth Circuit listed four factors

The district court held that an amphibian plane crash had a significant relationship with traditional maritime activity on two different gounds.[24] The narrower ground upon which maritime nexus was based was that the crash occurred during the takeoff phase of a seaplane flight, which has a distinct maritime character.[25] The court emphasized the fact that seaplane takeoffs differ in important respects from takeoffs by land-based airplanes due to the maritime nature of the "runway." While on the water a seaplane is subject to the maritime rules of the road[26] and is faced with unique maritime dangers such as flotsam, ligan, and erratic boaters and snorkelers. Even for some time after leaving the water a seaplane must encounter special maritime hazards. For example, a seaplane may have to maneuver around large ships anchored in a pattern determined by the harbormaster. Moreover, the enclosing hills which make for a sheltered harbor and the calm waters necessary for a seaplane takeoff pattern or funnel the winds into unexpected turbulent streams.[27] Thus, the court reasoned that any seaplane crash

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to be considered in determining whether there is a substantial maritime relationship: 1) the functions and roles of the parties, 2) the types of vehicles and instrumentalities involved, 3) the causation and the type of injury, and 4) traditional concepts of the role of admiralty. 485 F.2d at 525.

[24] The district court's belief that aircraft and ship accidents should receive similar treatment in the courts was set forth as a final policy consideration, which the court felt supported both of its grounds for finding maritime nexus. 355 F. Supp. at 687. Two reasons were given for this belief. The first reason was that the legal terminology for analyzing aircraft and ships is sufficiency similar that aviation and maritime law may be compared with profit. 355 F. Supp. at 688. This reason, however, appears to be directly contradictory to the Supreme Court's statement in *Executive Jet* that the concepts of admiralty law are wholly alien to air commerce. *See* text at notes 11-15, *supra*. The second reason the court gave in support of its belief was that aviation torts should be given the benefit of the flexibility of laches because an aircraft crash is a complicated tort and, like ship accidents, is followed by a lengthy official inquiry. 355 F. Supp. at 688. The reason, however, involves a clear invasion of the province of the legislature which established the statute of limitations for common law torts. Thus, the policy consideration appears to be highly questionable.

[25] 355 F. Supp. at 686-87.

[26] Regulations for Preventing Collisions at Sea, 33 U.S.C. § 1061(a) provides that:

> Sections 1061 to 1094 of this title shall be followed by all vessels and seaplanes upon the high seas and in all waters connected therewith navigable by seagoing vessels, except as provided in section 1092 of this title.

[27] 355 F. Supp. at 686. It is difficult to see how the aviation hazards posed by enclosing hills could be considered maritime. This is a good example of the court's overemphasis of the differences between conventional takeoffs and seaplane take-

which occurs before the plane leaves the harbor basin, reaches an altitude sufficient to clear all surface shipping,[28] and attains speed sufficient to maintain control of the plane in case of engine failure has a sufficient maritime nexus to support admiralty jurisdiction.[29]

In order to sustain admiralty jurisdiction, however, it was necessary for the court not only to distinguish the facts of *Hark*, which involved a seaplane takeoff, from the facts of *Executive Jet*, which involved a conventional takeoff, but also to take the further step of showing how admiralty expertise would be relevant to deciding the merits of a seaplane takeoff case. The weakness, therefore, in the court's first ground for finding a maritime nexus is that the question of whether admiralty law is tailored to handle the peculiar issues involved in claims arising out of seaplane takeoffs was forgotten in the court's discussion of the great differences between seaplane takeoffs and conventional takeoffs. Although it is well-established that claims arising out of the operation of an amphibian plane, while on the water, are cognizable in admiralty,[30] this rule is based on the fact that a seaplane, while on the water, is operating in its secondary role as a waterborne vessel and its movements are subject to the maritime rules of the road. Hence, admiralty law and expertise will be clearly relevant in determining liability. On the other hand, it is difficult to see how admiralty expertise will be relevant to claims arising after the aircraft has become airborne, since an amphibious airplane is no longer subject to the maritime rules of the road after it leaves the water.[31] In *Hark*, for example, there was no indication that the accident was actually caused by any of the special maritime hazards discussed by the court. In addi-

offs at the expense of trying to show how admiralty law would be relevant to the peculiar issues involved in claims arising out of seaplane takeoffs.

[28] The plane had reached an altitude of approximately 200 feet at the time of the engine failure. *Id.* at 685.

[29] *Id.* at 687.

[30] *See, e.g.*, Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921) (opinion by Cardozo, J.). *See also* Lambros Seaplane Base v. The Batory, 215 F.2d 228, 231 (2d Cir. 1954).

[31] Federal Aviation Act of 1958, 49 U.S.C. § 1509(a) (1970) provides that:

> Except as specifically provided in sections 143-147(d) of Title 33, the navigation and shipping laws of the United States, including any definition of "vessel" or "vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

tion, making the point at which the plane attains minimum control speed,[32] reaches a certain altitude, and leaves the harbor basin the dividing line between maritime and non-maritime torts will result in the creation of very difficult, peripheral factual issues and distinctions which admiralty law is ill-equipped to handle. A better point to demarcate when an amphibious airplane flight loses its maritime nexus is the point at which the aircraft leaves the water.

If the first ground were the extent of the court's holding in *Hark*, the decision would be relatively unimportant because it could be confined to seaplane takeoffs. But admiralty jurisdiction was also based upon a broader second ground, perhaps because the district court recognized the weakness in its first ground. It was alternatively held that a crash occurring during *any* part of the flight in *Hark* would have a sufficient maritime nexus because the flight was to be primarily over the high seas beyond the territorial jurisdiction of the Virgin Islands and the airplane was performing a function—the transportation of mail, passengers, and freight between the islands —traditionally performed by waterborne vessels.[33] In reaching this conclusion the district court in *Hark* relied on the Supreme Court's suggestion in *Executive Jet* that a mid-Atlantic crash of an airplane flying from New York to London might "bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels."[34] Moreover, the Court in *Executive Jet* recognized that if maritime law were not applicable in the area of international air commerce, recovery would depend on a confusing consideration of difficult choice of forum problems, choice of law problems, and international law problems.[35]

There are, however, two difficulties with the *Hark* court's reliance on the Supreme Court's hypothetical in *Executive Jet*. First, the district court completely ignored the fact that the Supreme Court also acknowledged Professor Moore's argument that even a crash into international waters during an international flight

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[32] Note that minimum control speed (VMC) is an aviation concept which is foreign to admiralty rules and concepts. It is the speed at which a twin engine plane can fly on one engine.

[33] 355 F. Supp. at 687.

[34] 409 U.S. at 271.

[35] *Id.* at 272.

would not have a sufficient maritime nexus.[36] Moore pointed out that if claims arising out of an airplane crash into navigable waters during a transoceanic flight were cognizable in admiralty, the following anomaly would result. A person injured in the crash would have a maritime tort claim if the plane went down before reaching shore, but a non-maritime tort claim if the plane managed to remain airborne until reaching the shore, even though the cause of the crash in both instances may have been the development of engine trouble or pilot error that occurred at an identical site far out over the ocean.[37] According to Moore, this type of irrational distinction, resulting from the forced application of an inappropriate body of maritime law to aviation torts, cannot be justified by the difficult choice of law problems inherent in claims arsing out of an international flight.[38] Moore concluded that "[c]learly, a maritime connection does not exist in matters involving airplane crashes . . ."[39] and such matters should not be included within admiralty jurisdiction.[40] A federal district court in Florida reached the same conclusion as Moore with respect to the lack of a maritime nexus in airplane crashes in *Horton v. J. & J. Aircraft, Inc.*[41] *Horton* involved a libel for damages for personal injury arising out of a plane crash into the Atlantic Ocean during a flight from Florida to the British West Indies. Despite the fact that the crash occurred during an international, transoceanic flight, the court found that it had no maritime relationship.[42]

Secondly, even if the difficult choice of law and international law problems arising out of the crash of an international flight into international waters justifies the exercise of admiralty jurisdiction, this justification is not available in *Hark*. The flight in *Hark* was not

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[36] *Id.* at 271 n.21. It is interesting to note that Justice Stewart apparently relied quite heavily on Moore in writing the *Executive Jet* opinion. *See* 409 U.S. at 257, 259, 266, 271 n.21, 272 n.23.

[37] 7A J. MOORE, FEDERAL PRACTICE ¶ 330[5], at 3772 (2d ed. 1972).

[38] *Id.* at 3772-75.

[39] *Id.* ¶ .325[3], at 3540.

[40] *See* Bell, *Admiralty Jurisdiction in the Wake of Executive Jet*, 15 ARIZ. L. REV. 67, 80 (1973); Note, *Hops, Skips, and Jumps Into Admiralty Revisited*, 39 J. AIR L. & COM. 625, 636 (1973).

[41] 257 F. Supp. 120 (S.D. Fla. 1966).

[42] *Id.* at 121. The tort action, nevertheless, was held to be cognizable in admiralty because the case was decided before *Executive Jet* and the court was following the "strict locality" test of admiralty tort jurisdiction.

international, being merely between two territorial islands, and the aircraft did not crash into international waters. Consequently none of the problems appurtenant to a claim arising out of an international flight or a crash into international waters were present in *Hark*. Therefore, the only support that remains for the alternative ground for finding a sufficient maritime nexus in *Hark* is the fact that the aircraft was performing a function traditionally performed by waterborne vessels.

To justify a finding of maritime nexus solely on the basis that an airplane is performing a function traditionally performed by waterborne vessels is to reduce the maritime nexus requirement to an inflexible, mechanical rule based on departure and destination points. Any airplane flying primarily over navigable waters could be said to be performing a traditional maritime function of some sort.[43] Consequently, if maritime nexus can be based simply upon the fact that the airplane is performing a maritime function, any airplane flight that is to be primarily over navigable waters and whose departure or destination point is outside the continental United States will have a sufficient maritime nexus *per se*. Such a rule makes the superficial consideration of departure and destination points determinative[44] and results in meaningless distinctions. For example, an airplane carrying passengers between Houston and Miami is also performing a function traditionally performed by waterborne ves-

[43] *See, e.g.*, Roberts v. United States, 498 F.2d 520 (9th Cir. 1974) (a cargo plane transporting supplies from the United States to Vietnam was found to be performing the functions of a freighter); Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973) (a helicopter transferring passengers between shore and several offshore rigs was considered to be performing the ordinary functions of a crewboat).

The *reductio ad adsurdum* of the "function" analysis is that even many airplanes flying primarily over land are performing functions traditionally performed by waterborne vessels. For example, the airplane in *Executive Jet* was carrying passengers from Cleveland, Ohio, to New York, a function traditionally performed by Great Lakes shipping.

[44] *See, e.g.*, Teachey v. United States, 363 F. Supp. 1197 (M.D. Fla. 1973). In *Teachey* a Coast Guard helicopter enroute to St. Petersburg crashed just off the coast of Florida after rescuing plaintiffs' decedent from a sinking shrimp boat in the Gulf of Mexico. Plaintiffs argued that the crash had a significant maritime relationship because the helicopter was performing a sea rescue function traditionally performed by waterborne vessels. The district court felt compelled to find that there was no maritime nexus because the helicopter had refuelled in Key West after the rescue operation before proceeding towards St. Petersburg, and the crash therefore occurred during a flight between two points within the contitental United States.

sels. Yet, should a crash into navigable waters occur, *Executive Jet* would compel a finding of no maritime nexus because the flight was between two points within the continental United States. In terms of performing a maritime function, the only distinction between a flight between two territorial islands and a Houston-to-Miami flight is that traditionally the transportation of passengers between islands was exclusively performed by waterborne vessels whereas there were other means of transportation between Houston and Miami. Making such a spurious and irrelevant distinction the basis for finding a maritime connection in the case of the inter-island flight, while holding that there is no maritime nexus in the case of the Houston-to-Miami flight, seems totally unjustified.[45]

The fundamental weakness in the second ground is that the district court lost sight of what the court itself recognized as the primary concern in deciding the maritime nexus issue; *i.e.*, will the expertise of admiralty be relevant in deciding the merits of the case? Since in the words of the Supreme Court in *Executive Jet* the rules and concepts of admiralty law "are wholly alien to air commerce . . . ,"[46] it would be only in a rare case, such as a collision between a ship and an aircraft, that substantive admiralty law would be relevant to an aviation tort and a sufficient maritime relationship would exist. Thus, if the relevance standard were applied, the forced application of admiralty law to a case like *Hark*, which has a number of superficial connections with traditional maritime activity, but which will ultimately be decided on the basis of concepts totally foreign to maritime law, would be precluded.

The Supreme Court in *Executive Jet*,[47] as well as numerous commentators,[48] has suggested that Congress, pursuant to the commerce clause, enact legislation providing for uniform substantive and procedural laws to be applied to all claims arising out of aviation accidents, which would be specially adapted to the peculiarities and

[45] *See* Bell, *supra* note 40, at 77; Note, *Maritime Locality Plus Maritime Nexus*, 14 B.C. IND. & COM. L. REV. 1071, 1088-90 (1973).

[46] 409 U.S. at 270.

[47] *Id.* at 274.

[48] *See, e.g.*, 7A J. MOORE, *supra* note 37, at 3775-76; Sweeny, *Is Special Aviation Liability Legislation Essential?*, 19 J. AIR L. & COM. 166(Pt.1), 317(Pt.2) (1952). For a discussion of the attempts in Congress to pass a federal aviation liability law, *see* Comment, *Hops, Skips, and Jumps into Admiralty*, 38 J. AIR L. & COM. 53, 62-63 (1972).

needs of air commerce. As long as Congress neglects to adopt this ideal solution, however, the goal of developing a uniform body of law to be applied to all aviation tort claims will not be furthered by sporadically applying federal admiralty law to occasional aviation tort cases. The holding of the Supreme Court in *Executive Jet* gave the courts the opportunity to eliminate general maritime law[49] from the morass of state and federal laws that now govern aviation torts and thereby end an unwarranted intrusion of admiralty law into an alien field. If followed by other courts, the unfortunate effect of *Hark* and its analysis of the maritime nexus issue in terms of "function" will be the restriction of *Executive Jet* to flights primarily over land. Thus, the opportunity to exclude aviation torts from the jurisdiction of general maritime law will be lost, and the door will be opened to extending admiralty jurisdiction over aviation torts to much the same position it occupied before *Executive Jet.*

Paul Price

[49] General maritime law is the traditional body of maritime law implemented by section 9, chapter 20 of the Judiciary Act of 1789. *See* text at note 4, *supra.* General maritime law must be distinguished from special statutory additions to admiralty law that have been made since 1789 and whose applicability to aviation accidents remains unchanged by *Executive Jet.* The Death on the High Seas Act is an example of special statutory admiralty law that remains applicable to aviation accidents, regardless of whether the accident had a maritime nexus. 409 U.S. at 274 n.26.

Current Literature