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Admiralty Tort Jurisdiction: Floundering in the Sea of Inconsistency

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COMMENTARIES

ADMIRALTY TORT JURISDICTION: FLOUNDERING ON THE SEA OF INCONSISTENCY*

The United States Constitution grants the federal courts "judicial Power" in "all Cases of admiralty and maritime Jurisdiction."[1] There is, however, no constitutional elaboration of the boundaries of such jurisdiction.[2] Consequently, the primary, and often the only, traditional criterion for federal admiralty tort jurisdiction was whether the tort occurred upon navigable waters.[3] This jurisdictional standard was appropriately labeled the "strict locality" test.

The strict locality test, due to the multifold increase in water-related activities and concomitant expansion of admiralty jurisdiction, has become the

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1. U.S. CONST. art. III, §2. Pursuant to its constitutional grant, Congress constructed the initial federal court system in the Original Judiciary Act of 1789 and conferred upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Act of Sept. 24, 1789, ch. 20, §9, 1 Stat. 77, *as amended,* 28 U.S.C. §1333(1) (1970). The "saving to suitors" clause conditions the exclusivity of federal authority to a point where federal and common law jurisdiction have been deemed concurrent. *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924); New Jersey Steam Navigation Co. v. Merchants Bank, 47 U.S. (6 How.) 344 (1848); American Mfrs. Mut. Ins. Co. v. Manor Inv. Co., 286 F. Supp. 1007, 1009 (S.D.N.Y. 1968) ("The state courts have concurrent jurisdiction in admiralty and maritime cases under a saving clause."); Monarch Indus. Corp. v. American Motorists Ins. Co., 276 F. Supp. 972 (S.D.N.Y. 1967); Chambers-Liberty Counties Navigation Dist. v. Parker Bros., 263 F. Supp. 602, 605 (S.D. Tex. 1967). *See generally* 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY 34-35 (6th ed. 1940); G. GILMORE & C. BLACK, LAW OF ADMIRALTY 33-36 (1957); 7A J. MOORE, FEDERAL PRACTICE ¶.210, at 2201-10 (2d ed. 1972); D. ROBERTSON, ADMIRALTY AND FEDERALISM 18-27, 123-24 (1970).

2. *See generally,* for a discussion of the purpose and meaning of the constitutional grant, G. GILMORE & C. BLACK, *supra* note 1, at 11, 18-20; R. HUGHES, HANDBOOK OF ADMIRALTY LAW 4-13 (2d ed. 1920); J. MOORE, *supra* note 1, ¶.200[2], at 2031-41; Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 259 (1950); Chamlee, *An Introduction to Admiralty,* 22 MERCER L. REV. 523, 524 (1971). For an extensive discussion of the English origin of admiralty jurisdiction, see DeLovio v. Boit, 7 F. Cas. 418, 441-44 (No. 3776) (C.C.D. Mass. 1815).

3. *See* The Admiral Peoples, 295 U.S. 649 (1935); Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914); The Plymouth, 70 U.S. (3 Wall.) 20 (1865); Gowdy v. United States, 271 F. Supp. 733 (W.D. Mich. 1967); Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963). For an extensive list of cases holding locality alone to be the controlling factor, see Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 n.2 (1971). For reasons unclear even today, the availability of admiralty jurisdiction in maritime contract matters has focused on the conceptual connection with maritime commerce or navigation. *See* Kossick v. United Fruit Co., 366 U.S. 731 (1961); Cortes v. Baltimore Insular Line, 287 U.S. (1932). *See generally* J. MOORE, *supra* note 1, ¶¶.225-.300, at 2701-3325.

target of mounting criticism. Several commentators have suggested[4] and some courts have employed[5] an additional jurisdictional requirement: the presence of a "traditional maritime activity." The United States Supreme Court acknowledged need for this additional "maritime activity" test in *Executive Jet Aviation, Inc. v. City of Cleveland.*[6] The Court's failure to define a "traditional maritime activity," however, coupled with its retention of locality as a crucial element in determining jurisdiction, has left the jurisdictional question unsettled. Indeed, post-*Executive Jet* decisions have demonstrated a widespread lack of uniformity in detailing the components of a maritime tort.[7] Thus, the need has arisen for a definitive jurisdictional standard that will reflect the constitutional intent of providing a select group with unique access to federal courts. The purpose of this commentary is to examine current standards of admiralty tort jurisdiction and to propose a new standard that will accommodate both the aims of the Constitution's framers and the realities of modern maritime commerce.

BACKGROUND

Early judicial reliance on the strict locality test[8] proved sound because tortious occurrences on navigable waters were generally limited to those involving maritime vessels. The few nineteenth-century cases addressing the question of jurisdiction involved borderline situations concerning the exact location of the tortious act.[9] The Supreme Court provided initial guidance in *The Plymouth,*[10] which involved the destruction of wharf storehouses by fire originating on a nearby ship. The Court, denying admiralty jurisdiction, equated the situs of injury with the situs of tort: "The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the *substance and consummation* of the same

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4. *See, e.g.,* E. BENEDICT, *supra* note 1, at 353-54; Black, *supra* note 2, at 254; Brown, *Jurisdiction of the Admiralty in Cases of Tort,* 9 COLUM. L. REV. 1, 8-9 (1909); Hough, *Admiralty Jurisdiction — Of Late Years,* 37 HARV. L. REV. 529, 531-32 (1924); White, *Admiralty Jurisdiction Adrift,* 28 U. PITT. L. REV. 635 (1967); Comment, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?,* 1968 U. ILL. L.F. 95 (1968).

5. *See* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972); Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903); Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961).

6. 409 U.S. 249 (1972).

7. *See* Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973); Maryland v. Amerada Hess Corp., 356 F. Supp. 975 (D. Md. 1973); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D. St. Thomas & St. John 1973); Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973).

8. Justice Story, on circuit, provided the earliest judicial expression of the "strict locality" test: "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act." Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813).

9. *See, e.g.,* Johnson v. Chicago & Pac. Elevator Co., 119 U.S. 388 (1886); *Ex parte* Phenix Ins. Co., 118 U.S. 610 (1886); The Highlight Light, 12 F. Cas. 138 (No. 6,477) (D. Md. 1867).

10. 70 U.S. (3 Wall.) 20 (1865). The result of this case has been somewhat modified by the Extension of Admiralty Jurisdiction Act. See text accompanying note 21 *infra.*

must have taken place upon these waters to be within admiralty jurisdiction."[11] Since the storehouses were destroyed on an extension of the land, admiralty jurisdiction was denied.

The Court's interpretation of strict locality in *The Plymouth,* making the tort synonymous with the injury, provided the impetus for numerous inconsistent and inequitable results. For example, admiralty jurisdiction was denied in the case of a longshoreman who, while standing on a dock, was killed by a swinging cargo sling and thrown into the water.[12] Such jurisdiction was upheld, however, where a passenger fell from a gangplank and incurred injuries upon hitting the dock below.[13] Although in each case the "substance and consummation" of the injury occurred on land, opposite rulings as to jurisdiction resulted.

In addition to the question of where the tort occurred, a second major problem arising from the mechanically applied strict locality doctrine involved situations where the maritime locality of the injury was clear but the questioned activity lacked any semblance to traditional forms of maritime commerce or navigation. Thus, a swimmer struck by a surfboard,[14] an injured water skier,[15] a worker struck by the propeller of a seaplane adrift,[16] and an injured plane passenger whose flight terminated with a sound dunking in the Atlantic Ocean,[17] were allowed the distinct advantages[18] of an admiralty proceeding in federal court. On the other hand, stevedores, crew members, and longshoremen were denied access to federal court because, to their misfortune, they happened to be on a wharf rather than on a vessel at the time of injury.[19]

11. 70 U.S. (3 Wall.) at 35 (emphasis added).

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

13. The Admiral Peoples, 295 U.S. 649 (1935). *But see* Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (admiralty jurisdiction upheld where a longshoreman aboard a vessel was struck by a swinging hoist and thrown to the wharf); Fireman's Fund Ins. Co. v. City of Monterey, 6 F.2d 893 (N.D. Cal. 1925) (admiralty jurisdiction upheld where cases of sardines were thrown from a pier and damaged upon impact with water).

14. Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965).

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

16. Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 133 N.E. 371 (1921).

17. Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966); *cf.* Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963).

18. Under admiralty jurisdiction a claimant may bring his cause of action in federal court absent diversity of citizenship. *E.g.,* Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833). The claimant need not establish a requisite jurisdictional amount. *E.g.,* Stratton v. Jarvis, 33 U.S. (8 Pet.) 4 (1834). Moreover, an admiralty suit may be brought absent any independent basis for federal jurisdiction. *E.g.,* The Robert W. Parsons, 191 U.S. 17, 33 (1903). Seldom will contributory negligence or assumption of the risk act as a bar to recovery. *E.g.,* Hornsby v. Fish Meal Co., 431 F.2d 865, 867 (5th Cir. 1970); King v. Testerman, 214 F. Supp. 335, 336 (E.D. Tenn. 1963). In addition, admiralty jurisdiction confers the traditional maritime remedies of garnishment and attachment, liberal venue proceedings, and the availability to claimant of a choice of forum under the "saving to suitors" clause. *See* note 1 *supra. See generally* FED. R. CIV. P. SUPP. RULES A-F (Admiralty and Maritime Claims).

19. *See* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) (admiralty jurisdiction denied longshoreman in suit for injuries sustained while operating shipowner's defective fork lift on dock). *See also* Nacirema Operating Co. v. Johnson 396 U.S. 212 (1969); Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946); Washington v. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

These harsh results of the strict locality test fostered two courses of judicial and legislative action. The first involved legislative implementation of a series of exceptions to the test. Congress enacted the Jones Act,[20] whereby seamen were granted a cause of action for personal injuries arising out of maritime employment regardless of the injury's situs. Later, the Extension of Admiralty Jurisdiction Act[21] was passed, permitting admiralty jurisdiction where injuries or damages caused by a vessel were consummated on land. The courts kept pace by recognizing the doctrine of maintenance and cure,[22] under which a vessel owner was required to feed and maintain disabled seamen regardless of where the injury or illness was incurred. Additionally, the doctrine of seaworthiness was judicially accepted[23] so that liability for faulty or dangerous equipment fell squarely on vessel owners notwithstanding the place of injury or damage. For each exception the criterion used as a standard was either status (seamen) or subject matter (maritime activity) rather than solely a location.

Realizing that these criteria constituted a more rational basis for a jurisdictional standard, a minority of federal courts implemented the second form of action intended to rectify the earlier inequitable results: the "locality plus nexus" test.[24] This new standard demanded not only a maritime location but

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20. Act of June 5, 1920, ch. 250, §33, 41 Stat. 1004, 46 U.S.C. §688 (1970). *See* Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). *See generally* E. BENEDICT, *supra* note 1, §25, at 42-53; G. GILMORE & C. BLACK, *supra* note 1, at 279-315; J. MOORE, *supra* note 1, ¶.325[4], at 3574-75; 2 M. NORRIS, THE LAW OF SEAMEN 297-393 (1952).

21. Act of June 19, 1948, ch. 526, 62 Stat. 496, 46 U.S.C. §740 (1970); *see* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Kent v. Shell Oil Co., 286 F.2d 746 (5th Cir. 1961). *See generally* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 157 (1969); J. MOORE, *supra* note 1, ¶.325[4], at 3580-84.

22. *See* Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) (consolidated decision where the Court held that sailors injured while on shore leave were entitled to the benefits of maintenance and cure); Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) (Court stated specifically that injury or illness need not result from the shipboard duties of a seaman). *See generally* H. BAER, *supra* note 21, at 1-11; G. GILMORE & C. BLACK, *supra* note 1, at 253-79; J. MOORE, *supra* note 1, ¶.325[4], at 3571-74; M. NORRIS, *supra* note 20, at 123-239.

23. *See* Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944) (Court determined "unseaworthiness" to include "operating negligence"); The Osceola, 189 U.S. 158 (1903). *See generally* H. BAER, *supra* note 21, at 13-41; G. GILMORE & C. BLACK, *supra* note 1, at 129-33, 315-32; J. MOORE, *supra* note 1, ¶.325[4], at 3575-80; M. NORRIS, *supra* note 20, at 240-60. The impact of the seaworthiness exception has been diluted by a 1972 amendment placing strict limitations on the doctrine's use by land-based workers. 33 U.S.C. §905(b) (Supp. 1975), *amending* 33 U.S.C. §905 (1970).

24. The issue was initially raised in a case involving injuries to a worker sustained while working in the hold of a ship. Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903). The court held that the claimant's cause of action could not be brought in federal court under admiralty jurisdiction, but stated: "In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction they must occur in a place where the law maritime prevails. But this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty." *Id.* at 700. An early commentator criticized the lower court's identical holding as "unsettling," "complicated," and an infringement upon "a rule which originated in the very nature of admiralty jurisdic-

also a strong resemblance between the activity and traditional maritime activity. The leading decision of *McGuire v. City of New York*[25] concerned a swimmer striking a submerged object protruding from the bottom of a public bathing beach. That court, in denying admiralty jurisdiction, criticized the sole use of the strict locality test, stating: "The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. A maritime wrong generally has been concluded to be one which in some way is involved with shipping or commerce."[26]

Utilizing the locality plus nexus test, other federal courts denied admiralty jurisdiction to a variety of libelants[27] including a swimmer who sustained injuries diving into navigable waters,[28] a driver whose automobile was damaged while parked on a floating pontoon,[29] a boat owner injured while standing in shallow water,[30] and a truck driver whose vehicle rolled off a ferry.[31] If, on the other hand, the traditional strict locality test had been used in these cases, admiralty jurisdiction would have been granted because the injuries or damages in each were consummated on navigable waters. These decisions, although in the minority, generated great confusion among federal courts attempting to define a proper jurisdictional standard.

The Supreme Court had the opportunity to end the persisting lack of uniformity in 1972 with its landmark decision in *Executive Jet Aviation, Inc. v. City of Cleveland.*[32] The libel, claiming property damage, arose from the crash of a plane caused by the ingestion of seagulls into the plane's engines during take-off. This resulted in a subsequent loss of power and the settling of the plane into Lake Erie. The Court, viewing activity as often a more reliable

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tion." See 16 HARV. L. REV. 210, 211 (1902). More recent criticism of the maritime connection test can be found. Note, *Admiralty-Tests of Maritime Tort Jurisdiction,* 44 TUL. L. REV. 166 (1969).

25. 192 F. Supp. 866 (S.D.N.Y. 1961).

26. *Id.* at 868-69.

27. Unique to admiralty law is the "libel," which constitutes "[t]he initiatory pleading . . . in an admiralty . . . cause, corresponding to the declaration, bill, or complaint." BLACK'S LAW DICTIONARY 1060 (4th ed. 1957).

28. Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).

29. Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972). Significantly, the court not only insisted upon the existence of a substantial maritime activity but also enumerated five factors designed to identify such an activity: the facilities in use, the relationship of the parties, the activities of the parties at the time of injury, the nature and cause of the accident, and the nature of the injuries sustained. 453 F.2d at 1126-27.

30. Hastings v. Mann, 340 F.2d 910 (4th Cir. 1965), *cert. denied,* 380 U.S. 963 (1965).

31. Le Master v. Chandler, 50 Wash. 2d 71, 309 P.2d 384 (1957).

32. 409 U.S. 249 (1972). The Supreme Court had upheld the use of the strict locality test as recently as 1971. See note 19 *supra.* The Court had declined, however, to rule out the possibility of a future incorporation of the locality plus nexus test. In Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914), the activity of a stevedore injured while working in the hold of a ship was acknowledged by the Court to be of maritime nature. Upholding the lower court's grant of admiralty jurisdiction the Court stated: "Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive . . . the District Court, from any point of view, had jurisdiction." *Id.* at 61.

test than the mechanically applied locality rule,[33] refused to allow admiralty jurisdiction, holding:

> It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from *airplane accidents* are not cognizable in admiralty.[34]

Underlying the Court's decision was a desire to eliminate the fortuity of the crash site as the prime factor[35] for invocation of admiralty jurisdiction.[36] Such intent was indeed noteworthy but the decision was neither broad enough in its scope nor specific enough in its jurisdictional standard to provide a workable guideline for later cases.

POST-*Executive Jet*: PERSISTING INCONSISTENCIES

General Confusion

Federal decisions subsequent to *Executive Jet* have displayed serious difficulty and inconsistency concerning both the scope of the Court's holding and its applicability to other types of admiralty claims. More importantly, the courts have been unable to define precisely the elements of a "traditional maritime activity" and to use it in conjunction with the strict locality test.

The *Executive Jet* holding specifically limited its application to "airplane accidents."[37] The federal courts' initial confusion thus centered on whether the holding could apply to other maritime torts. In *Maryland v. Amerada Hess Corp.*[38] a district court denied the state's claim for admiralty jurisdiction in a suit claiming damages resulting from an oil spill in Baltimore Harbor. The court specifically rejected the locality plus nexus test enunciated in *Executive Jet*. Instead, the *Amerada Hess* court found that the strict locality test was inadequate only in airplane accident cases or other such " 'perverse' or 'casuistic

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33. 409 U.S. at 268.

34. *Id.* (emphasis added).

35. *Id.* at 267. The Court illustrated such fortuity by means of a hypothetical mid-air plane collision with one plane crashing into the sea and the other on land. *Id.* This hypothetical situation would likewise raise serious problems not discussed by the Court concerning where the injury-tort occurred.

36. One exception to any admiralty jurisdictional standard is the Death on the High Seas Act (DOHSA), 46 U.S.C. §761 (1970), establishing a right of action exclusively in admiralty for wrongful deaths occurring beyond state territorial waters. *See* Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958), *cert. denied,* 358 U.S. 838 (1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957), *cert. denied,* 355 U.S. 907 (1957); Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968). *But see* Sierra v. Pan American Airways, Inc., 107 F. Supp. 519 (D.P.R. 1952); Choy v. Pan American Airways Co., 1941 A.M.C. 483 (S.D.N.Y. 1941) (DOHSA suits can be commenced outside the federal courts pursuant to the "saving to suitors" clause). See note 1 *supra.*

37. 409 U.S. at 268.

38. 356 F. Supp. 975 (D. Md. 1973).

borderline situation[s].' "[39] Yet in a similar fact situation[40] another court, relying on *Executive Jet,* employed the locality plus nexus test.[41] There, the court found that oil-damaged pleasure boats were performing a maritime activity and granted the libelants admiralty jurisdiction. A majority of federal courts have rejected the limitations of *Amerada Hess* and instead have deemed the *Executive Jet* principles relevant to other admiralty tort situations.[42] The lingering existence of this fundamental scope problem, however, and its potential for future inconsistencies evinces the initial inadequacy of the *Executive Jet* decision.

A further scope problem arose involving misinterpretation of *Executive Jet*'s requirement that a wider inquiry be made into maritime circumstances surrounding individual cases. In *Adams v. Montana Power Co.*[43] a district court, while attempting to rely on the *Executive Jet* locality plus nexus test, applied a novel interpretation of "navigable waters" rather than looking to the presence of a maritime activity. *Adams* involved the death of a small boat operator whose craft was capsized by the discharge from a power company. The accident occurred on a portion of a river enclosed by two dams, but that had previously been navigable. The court denied admiralty jurisdiction, finding the waterway unable to support traditional maritime activity and therefore unnavigable.[44] Such reasoning directly contradicted admiralty precedent[45] and was not within the *Executive Jet* jurisdictional standard. *Executive Jet* did not alter traditional notions of locality or "navigable waters," but merely added a nexus requirement to the old test.[46] The Supreme Court intended to eliminate from federal courts those cases arising out of nonmaritime activity occurring on navigable waters,[47] not to redefine the fundamental medium of admiralty jurisdiction. Thus, for the *Adams* court, the more appropriate rationale consistent with *Executive Jet* would have been simply to declare the absence of a traditional maritime activity.

The greatest source of confusion in post-*Executive Jet* cases has been the lack of any specific delineation of the elements of a "traditional maritime activity." Although the Court in *Executive Jet* held that such an activity must be present to invoke admiralty jurisdiction, it failed to provide any distinct guidelines on the subject.[48] Consequently, various federal courts attempting to fol-

39. *Id.* at 977.

40. Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973).

41. *Id.* at 256.

42. *See, e.g., In re* Motor Ship Pac. Carrier, 489 F.2d 152, 155 (5th Cir. 1974); Smith v. Kelly, 485 F.2d 520, 524 (5th Cir. 1973); Rubin v. Power Authority, 356 F. Supp. 1169, 1170-71 (W.D.N.Y. 1973); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683, 685-86 (D. St. Thomas & St. John 1973).

43. 354 F. Supp. 1111 (D. Mont. 1973).

44. *Id.* at 1112.

45. The *Adams* case directly refuted the established principle of "indelible navigability," which presumes that once a body of water is determined naviagable it will remain so regardless of subsequent transformations. *See* D. ROBERTSON, *supra* note 1, at 118-19.

46. The Supreme Court did not examine the locality of the injury once the lack of maritime activity was found to be dispositive of the issue at hand. 409 U.S. at 267-68.

47. *Id.* at 272.

48. The Court simply found a maritime activity to be present, stating: "We can find no

low the locality plus nexus test have decided analogous fact situations inconsistently. For example, admiralty jurisdiction was granted a libelant injured while on board a permanently-moored merchant vessel that had been restored as a museum,[49] but such jurisdiction was denied a painter who fell during the restoration of a similarly situated steamboat.[50] Moreover, while the Fourth Circuit has expressly enunciated a policy whereby admiralty jurisdiction will not be granted in libels arising solely out of the operation of pleasure craft,[51] the Eighth Circuit has upheld admiralty jurisdiction in a purely recreational boating accident.[52]

Airplane crash jurisdiction is particularly dependent upon factual distinctions and, therefore, uniformity is nonexistent. For example, the Court in *Executive Jet* specifically rejected the contention that a similarity existed between an airplane, while in the air or sinking, and a waterborne vessel.[53] Nevertheless, a seaplane above the water during take-off has been considered such a vessel.[54] Additionally, a district court, relying on *Executive Jet,* denied admiralty jurisdiction in a case involving the crash into navigable waters of a plane flying between points within the United States.[55] A transoceanic cargo flight, on the other hand, has been compared functionally to a ship carrying cargo and admiralty jurisdiction upheld.[56] In light of such decisions serious questions may arise in the future when a plane, whose intranational flight path carries it almost exclusively over navigable waters, crashes into those waters.[57] It is arguably unjust to deny such libelants the federal forum because the

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significant relationship between such an event befalling a land-based plane flying from one point in the continental United States to another, and traditional maritime activity involving navigation and commerce on navigable waters." *Id.* at 273.

49. Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973). In addition, the vessel had been removed from commerce for over forty years, had not been subject to inspection, and had been classified by the Coast Guard as a "land structure." *Id.* at 60.

50. Jiles v. Federal Barge Lines, Inc., 365 F. Supp. 1225 (E.D. La. 1973). The steamboat had been permanently moored, its engines removed, and was connected to shore-based telephone lines. *Id.* at 1226.

51. In Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973), which involved an injured water skier suing the towboat driver for negligent operation of the boat, the court stated: "[W]e can perceive no apparent federal interest in providing a forum or a uniform body of law for the adjudication of claims growing solely out of the operation of pleasure craft." *Id.* at 841. *See generally* Stolz, *Pleasure Boating and Admiralty: Erie at Sea,* 51 CALIF. L. REV. 661 (1963).

52. In St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974), which involved injuries to a pleasure boat passenger incurred when he was thrown from the boat, the court stated: "The navigation of waterborne vessels on those waters, even if not directly engaged in commerce themselves, presents a potential danger to the operation of vessels which are engaged in commerce on those waters." *Id.* at 979.

53. 409 U.S. at 268-70.

54. Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D. St. Thomas & St. John 1973).

55. Miller v. Counsins Properties, Inc., 378 F. Supp. 711 (D. Vt. 1974).

56. Roberts v. United States, 498 F.2d 520 (9th Cir. 1974) (plane transporting cargo between Los Angeles and Vietnam crashed attempting to land in Okinowa). In *Executive Jet* the Supreme Court specifically declined to decide whether transoceanic flights are a traditional maritime activity. 409 U.S. at 264 n.15.

57. Such a readily foreseeable issue was noted by the Court in *Executive Jet,* but not examined. 409 U.S. at 275 n.26.

take-off and landing points are within the continental United States in light of the grant of admiralty jurisdiction to international passengers who may spend much less time airborne over water. Such distinctions have not yet arisen.[58] When new cases do arise, courts employing available precedent may find great difficulty in dealing with them.

In summary, only those fact situations presenting such blatantly nonmaritime activities as swimming[59] and diving[60] have escaped the confusion surrounding present-day admiralty tort jurisdiction. This confusion is not limited solely to unusual fact situations but extends to such routine cases as those involving pleasure boat accidents. Accordingly, a new jurisdictional standard is urgently needed. One circuit court has attempted to elaborate such a guideline.

The Fifth Circuit Test

The Fifth Circuit is the only federal court that has devised a specific test to determine whether an activity is maritime in nature. By analyzing certain surrounding factors,[61] that court has sought to achieve a degree of consonance in its own decisions while concomitantly developing a uniform standard for other courts. Examination of the three latest Fifth Circuit decisions, however, casts doubt that this aim has been realized.

Kelly v. Smith[62] involved a suit for injuries sustained by escaping deer poachers who were fired upon by the defenders of a private hunting reserve. Using its factor test[63] the court upheld admiralty jurisdiction but placed great emphasis on the locality of the injury. The occurrence of a "traditional maritime activity" was found in the operation of a fifteen-foot outboard pleasure craft[64] and in the fact that such a shooting presented a sufficient danger to maritime commerce.[65] The court did not look to the use of the boat in a poaching context but rather considered any boat carrying people upon navigable waters a maritime activity. This conclusion is in direct conflict with a Fourth Circuit decision denying admiralty jurisdiction in suits concerning a

58. A recent case may provide marginal guidance in this area. *See* Higgenbottham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973). That case involved the crash of a helicopter while carrying men and equipment between the coast and an off-shore oil rig. The court analogized such a function to that of a crewboat and hence found a maritime activity despite the intra-United States nature of the flight. *See also* Teachey v. United States, 363 F. Supp. 1197, 1199 (M.D. Fla. 1973) (dictum classifying a helicopter's search and rescue mission a maritime activity).

59. *See* Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758 (4th Cir. 1973) (admiralty jurisdiction denied to libelant injured when he struck a submerged boat ramp due to utility company's lowering of the water level).

60. *See* Rubin v. Power Authority, 356 F. Supp. 1169 (W.D.N.Y. 1973) (admiralty jurisdiction denied where divers were sucked into utility company's water intakes and drowned).

61. See note 29 *supra.*

62. 485 F.2d 520 (5th Cir. 1973).

63. See note 29 *supra.* Significantly, Judge Morgan in his dissent was unable to agree on the fundamental factors to be applied, arguing that a federal versus state interest criterion should be included and that the situation at hand was clearly of the latter.

64. 485 F.2d at 526.

65. *Id.*

pleasure craft operation.[66] Moreover, the court's reliance on a finding of a sufficient danger to maritime commerce as a result of a single, unexpected burst of gunshots is misplaced. Such a claim might only be justified if, due to sporadic firing, a portion of the waterway was effectively closed.

In re Motor Ship Pacific Carrier[67] involved a ship proceeding on the navigable Savannah River that became engulfed by thick smoke emanating from a nearby paper mill and collided with a bridge. The Fifth Circuit upheld admiralty jurisdiction. As an isolated decision this case presents little conflict with either *Kelly* or the decisions of other courts. A ship carrying cargo from Georgia to Nova Scotia is certainly engaged in a traditional maritime activity and, obviously, the injury occurred upon navigable waters. *Pacific Carrier,* however, becomes significant when compared with another Fifth Circuit decision, *In re Dearborn Marine Service.*[68]

Dearborn was a consolidation of cases arising from an explosion on an off-shore oil platform. Among these cases was one brought by the executor of a platform worker who had been killed while on board a small ship moored to the platform. The ship was used to transport men and equipment between the platform and shore, to act as a service vessel, and to supply the workers with food and bathroom facilities unavailable on the platform. The court denied admiralty jurisdiction concluding that the worker was on the vessel for the purpose of performing duties directly related to platform operations. Equally critical was the finding that the physical cause of the decedent's death was the platform explosion, and that the cause of action was based on the negligent performance of platform operations.[69] Confusion initially arises as to the court's reliance on the latter two factors, which focus on the origin of the tort. As acknowledged in both *Kelly*[70] and *Pacific Carrier*[71] the situs of the injury has been deemed the situs of the tort. Thus, the consummation rather than the initiation of the act is the controlling factor[72] in determining locality. Since the injuries occurred on navigable waters the origin of the cause of injury should be irrelevant.

Dearborn also focused on whether the ship was engaged in a traditional maritime activity. The court found no such activity in the ship's support of the platform. Although the boat was not moving at the time of the explosion, it nevertheless fulfilled the *Kelly* requirement of a boat "whose function was transportation across navigable waters."[73] Further, the support of the crew or passengers carried by a ship would seem a traditional function of maritime commerce and accordingly place the case within admiralty jurisdiction.

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66. Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973); see note 51 *supra.*
67. 489 F.2d 152 (5th Cir. 1974), *cert. denied,* 94 S. Ct. 2643 (1974).
68. 499 F.2d 263 (5th Cir. 1974).
69. *Id.* at 275.
70. 485 F.2d at 523.
71. 498 F.2d at 157.
72. The initiation of the tort in *Dearborn* must be deemed land-based, as were those in *Kelly* and *Pacific Carrier,* due to the characterization of off-shore oil platforms as land structures. *See* Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).
73. 485 F.2d at 526.

The Fifth Circuit's attempt to establish a mode of analysis for determining admiralty jurisdiction is noteworthy, but the guidelines employed lack the requisite specificity to ensure consistent decisions. Analysis of the involved parties' relationships, facilities in use, instant activity, cause of the accident, and injuries incurred are too imprecise. Where the decision depends on a balancing of these factors, similar fact situations can be decided contradictorily by different courts. A specific jurisdictional standard that will allow neither inconsistent results nor unwarranted expansion of admiralty jurisdiction is urgently needed.

EVALUATION: A NEW JURISDICTIONAL STANDARD

The persisting confusion in admiralty tort jurisdiction is readily apparent and has been noted by other commentators.[74] Guidelines that would overcome such inconsistency are difficult to achieve. Nevertheless, the following changes are proposed: (1) the invocation of admiralty jurisdiction *solely* in cases involving those maritime activities, or those in immediate support of such activities, that were within the intent of the Constitution's framers and of Congress; (2) the rejection of the strict locality test or any locality requirement; and (3) the passage of legislation controlling aviation accident litigation.

The purpose of the Constitution in specifically providing for federal admiralty subject matter jurisdiction[75] and of Congress in enacting enabling legislation[76] was to provide an "orderly and uniform judicial governance of the concerns of the maritime industry."[77] It arose out "of a felt need to protect the domestic shipping industry in its competition with foreign shipping,"[78] and to protect the "needs of men engaged in a perilous and transient profession."[79] Admiralty jurisdiction was not intended to be available in cases involving the use of pleasure craft[80] or the escape of poachers via a small craft.[81] Nor would the grant apply to airplane crashes[82] if such had existed at the time. Rather, admiralty jurisdiction was designed solely for maritime commerce and navigation and for that select group of workers and crewmembers immediately supporting such activity.

Accordingly, the proposed standard would allow admiralty jurisdiction only in those cases involving any of the following: (1) a vessel engaged in a business

74. *E.g.*, Note, *Admiralty-Jurisdiction-For Aviation Tort Claims To Be Brought in Admiralty a Significant Relationship to Traditional Maritime Activity Must Be Shown*, 4 GA. J. INT'L & COMP. LAW 232 (1974); Note, *Admiralty—In Search of a New Test for Admiralty Tort Jurisdiction: The Aftermath of* Executive Jet, 7 VAND. J. TRANS. L. 459 (1974).

75. U.S. CONST. art. III, §2.

76. 28 U.S.C. §1333(1) (1970). See note 1 *supra*.

77. Black, *supra* note 2, at 262.

78. Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973).

79. Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQ. L. REV. 1, 36 (1968). Various authorities have detailed admiralty jurisdiction as a privilege due those engaged in such a hazardous and transient occupation. *See* Waldron v. Moore-McCormick Lines, 386 U.S. 724 (1967); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

80. *But see* St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

81. *But see* Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973).

82. *But see* Roberts v. United States, 498 F.2d 520 (9th Cir. 1974).

or commercial venture at the time of the injury or damage, (2) an injured party who is permanently employed in the *immediate* support of such vessels, or (3) activities constituting *substantial* navigational hazards to such vessels. Under this standard there would be little need for the exceptions to the strict locality test.[83] Thus, a longshoreman required to drive fifty miles inland to obtain a replacement gear for a vessel who is subsequently injured would be granted admiralty jurisdiction, but an injured electrician who has been subcontracted to install a dozen light sockets on board a moored ship would be denied such jurisdiction.

Although the transition to such a standard would involve certain initial conflicts,[84] it nevertheless would provide concrete guidelines for determination of a maritime tort. Such a standard would prove superior to the Fifth Circuit standard,[85] which lacks this flexibility to allow for future unwarranted expansion.

The adoption of this new standard would preclude the necessity of any locality requirement. In considering solely whether a maritime activity is involved, as has been the traditional format for maritime contract suits[86] and the exceptions to the strict locality test,[87] locality becomes irrelevant. Moreover, any need to identify the point of injury would be removed. Finally, the questionable axiom that the situs of the injury is synonymous with the tort would no longer offend traditional notions of tort law and various legal academicians.[88]

Either of these suggested changes could be readily implemented by the courts, since the federal court system has the responsibility of ascertaining the limits of admiralty jurisdiction "within the general language and history of the constitutional grant."[89] Importantly, such action would not require a radical departure from the *Executive Jet* rationale. That Court declined to decide whether a maritime locality was present because the lack of a maritime activity was dispositive of the case.[90] Indeed, the Court cited "the problems inherent in applying the strict locality test."[91] Thus, the means are available for the Court to deem the locality factor irrelevant.

The enactment of federal legislation to cover all aviation accident claims, whether for personal injury, property damage, or wrongful death is not a

83. See text accompanying notes 20-23 *supra.*

84. For example, marginal fact situations prompting inquiry whether the vessel was involved in a commercial activity at the time or whether an employee was acting in the immediate support of a vessel would undoubtedly arise.

85. See note 29 *supra.*

86. See note 3 *supra.*

87. See text accompanying notes 20-23 *supra.*

88. *See* Black, *supra* note 2, at 264, concluding that a tort, which is a "mental construction and doesn't 'take place' anywhere," cannot be deemed synonymous with injury. See also Smith v. Kelly, 495 F.2d 520, 525 (5th Cir. 1973) (injury determined to be only one element of a tort).

89. Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 158 (6th Cir. 1971). *See also* Detroit Trust Co. v. The Thomas Barcum, 293 U.S. 21 (1934); The Steamer St. Lawrence, 66 U.S. (1 Black) 522 (1861).

90. 409 U.S. at 267.

91. *Id.*