Vanderbilt Journal of Transnational Law

Volume 7
Issue 2 *Spring 1974*

Article 6

1974

# Recent Developments

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# RECENT DEVELOPMENTS

## ADMIRALTY—IN SEARCH OF A NEW TEST FOR ADMIRALTY TORT JURISDICTION: THE AFTERMATH OF *Executive Jet*

### I. INTRODUCTION

The traditional American "locality" test[1] for admiralty tort (subject-matter) jurisdiction, which posits the occurrence[2] of the tort on navigable waters[3] as the controlling factor, has suffered mounting criticism through the years because it has resulted in unwarranted expansion of admiralty jurisdiction. Numerous federal courts consequently have suggested the need of an additional requirement that the claim involve some sort of traditional maritime activity to invoke admiralty jurisdiction.[4] The Supreme Court, however, used only the locality test prior to deciding *Executive Jet Aviation, Inc. v. City of Cleveland*,[5] in which the Court found both the historical requirement of locality and a "significant relationship to traditional maritime activity" necessary for admiralty jurisdiction.[6] The holding in *Executive Jet*, however,

1. *See* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971); The Plymouth, 70 U.S. (3 Wall.) 20 (1866). The Court in *Victory Carriers* cited over forty cases utilizing the traditional test. 404 U.S. at 205 n.2.

2. The use of the locality test presents the question whether the place of injury or the place of the conduct determines where the tort "occurs." This confusion has proved to be a difficult area for the courts and has contributed to a lack of uniformity in admiralty. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). *Compare* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963) *with* Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).

3. Traditionally, all that has been considered in deciding whether waters are navigable is whether the waters are or with reasonable improvement could be made navigable; and all waters once navigable have been deemed to remain navigable despite changed conditions. D. ROBERTSON, ADMIRALTY AND FEDERALISM 118-19 (1970).

4. *See, e.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Campbell v. H. Hackfield & Co., 125 F. 696 (9th Cir. 1903); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961).

5. 409 U.S. 249 (1972). *See* 6 VAND. J. TRANSNAT'L L. 649 (1973).

6. 409 U.S. at 268.

applied only to aviation accidents,[7] and in subsequent cases the lower federal courts have struggled with the problem of *Executive Jet's* application to other types of admiralty claims and the continued utility of the locality rule. A series of recent federal court decisions illustrate this struggle and, therefore, offer a suitable basis for its evaluation.

## II. BACKGROUND

The roots of the historic locality test for admiralty tort jurisdiction lie in fourteenth-century England, where the admiralty courts' expanding jurisdiction[8] proved intolerable to the common law lawyers.[9] In response, Parliament in 1389 restricted admiralty jurisdiction to a "thing done upon the sea."[10] By the early 1800's, the English admiralty courts had established the locality test for maritime torts, while requiring both a maritime nature and locale for contract suits in admiralty.[11] Responding to the lack of a definitive American jurisdictional rule for admiralty courts, in 1815 Jus-

7. "We hold that unless [a significant relationship to traditional maritime activity] exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary." 409 U.S. at 268.

8. English admiralty courts exercising civil jurisdiction, along with their original criminal jurisdiction, emerged in the fourteenth century. This civil jurisdiction was derived from civil law admiralty procedures of the Continent. *See* Chamlee, *An Introduction to Admiralty*, 22 MERCER L. REV. 523 (1971). The civil law jurisdictional test for both contracts and torts was the maritime nature of the dispute. Locality was therefore only an element in the determination of the nature. *See* Note, *Admiralty Jurisdiction Over Torts*, 25 HARV. L. REV. 381 (1912). Fourteenth century English admiralty courts (before 1389) exercised similar jurisdiction. *Id.* at 381; Mears, *The History of the Admiralty Jurisdiction*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 312, 328-29 (1908).

9. Admiralty courts were more attractive to litigants because of the cumbersome procedural restraints found in the common law courts. The consequent loss of fees suffered by the common law lawyers, coupled with a dislike for the denial in admiralty of the right to jury trial, stimulated both parliamentary and judicial action whenever admiralty expanded its jurisdiction. Note, *New Guidelines for Admiralty Tort Jurisdiction*, 48 IND. L.J. 87, 90 n.17 (1972) [hereinafter cited as *Guidelines*].

10. Admiralty Jurisdiction Act of 1389, 13 Rich. 2, c. 5.

11. *See* A. BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW, AND OF THE LAW OF THE ADMIRALTY 72, 110 (1802). For an excellent history of English admiralty jurisdiction to 1840 see Mears, *supra* note 8, at 312. For an account of English admiralty jurisdiction to the present day see F. WISWALL, JR., THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1880 (1970).

tice Story in *De Lovio v. Boit*[12] examined the English doctrine and held that the American jurisdictional test for contracts in admiralty would require only a relationship to marine navigation, business or commerce.[13] Story concluded in dicta, however, that admiralty jurisdiction for torts was "necessarily bounded by locality."[14] Although not excluding any additional factors in determining such jurisdiction, his comments contained no implication that an additional test should be required. American lower courts thereafter used this single criterion for torts in admiralty, but the Supreme Court did not clearly adopt it until 1866 in *The Plymouth*,[15] where the Court made what has become the classic statement of American admiralty jurisdiction: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."[16]

Unfortunately, this strict locality test has resulted in a failure to satisfy either the purpose of admiralty, which is to provide a body of law to deal with the special problems of maritime commerce,[17] or the justification of a federal admiralty court system, which is uniformity within this special body of law.[18] Strict applications of the locality test have allowed claims which have no relation to maritime commerce to be entertained in some admiralty courts,[19] and in so doing have fostered disagreement among the courts concerning the encroachment of admiralty jurisdiction.[20] Those courts rejecting this expansion and the use of locality as the exclusive test generally have found that the tort must also have some relationship or connection with traditional maritime commerce or navigation.[21] This revised jurisdictional rule is referred to as the "locality-plus" or "locality-plus nexus" test.

12. 7 F. Cas. 418 (No. 3776) (C.C.D. Mass., Story, Circuit Justice, 1815).
13. 7 F. Cas. at 444.
14. 7 F. Cas. at 444 (dictum).
15. 70 U.S. (3 Wall.) 20 (1866).
16. 70 U.S. (3 Wall.) at 36.
17. 409 U.S. at 269; *Guidelines, supra* note 9, at 88.
18. *See* Smith v. Guerrant, 290 F. Supp. 111, 113 (S.D. Tex. 1968); 1 E.C. BENEDICT, BENEDICT ON ADMIRALTY § 10, at 14-15 (6th ed. 1940).
19. *See, e.g.*, Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (swimmer injured by surfboard); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (injuries to water skier).
20. *Compare* cases in note 19 *supra with* cases in note 4 *supra*.
21. *See* note 4 *supra*.

The Supreme Court refused, until recently, opportunities to adopt the locality-plus test. In *Atlantic Transport Co. of West Virginia v. Imbrovek*,[22] the Court recognized a possible need for the additional traditional maritime activity requirement, but held that the sufficient nexus of the wrong to maritime service, navigation and commerce in that case necessitated no revision of the locality rule.[23] As recently as 1971, the Court affirmed the traditional locality test in *Victory Carriers, Inc. v. Law*.[24] But in 1972, while addressing the particularly vexing jurisdictional area of air travel,[25] the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*[26] directly addressed the question whether locality alone will suffice for admiralty jurisdiction. Immediately after takeoff from an airport adjacent to Lake Erie, a business jet struck a flock of seagulls that had been flushed from the runway. Some of the birds were ingested in the plane's engines, causing a power loss that forced the plane into the navigable waters of Lake Erie. The plane's owners, Executive Jet Aviation, Inc., subsequently sued the owner of the airport, the city of Cleveland,[27] in admiralty, alleging negligence.[28] The District Court for the Northern District of Ohio[29] applied a locality-plus nexus test, found that neither requirement was satisfied, and dismissed for lack of admiralty

22. 234 U.S. 52 (1914).

23. 234 U.S. at 62. Indeed, many courts evidently found it unnecessary to consider an additional test because most cases arising on navigable waters involve traditional maritime activity. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 254 (1972).

24. 404 U.S. 202 (1971). "The historic view of the Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States." 404 U.S. at 205.

25. An excellent discussion of *Executive Jet's* effects on aviation torts in admiralty is in Bell, *Admiralty Jurisdiction in the Wake of Executive Jet*, 15 ARIZ. L. REV. 67 (1973). *See also* Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D. St. Thom. & St. John 1973).

26. 409 U.S. 249 (1972).

27. The airport manager and the air traffic controller, who was responsible for clearing the aircraft for takeoff, were also named as defendants.

28. Plaintiff alleged that defendant negligently failed to keep the airport runway free of birds and to give adequate notice of their presence.

29. The district court's opinion is unreported, but it is summarized and reproduced in part in the text of the Supreme Court opinion. 409 U.S. at 251-52.

jurisdiction.[30] The Court of Appeals for the Sixth Circuit affirmed the dismissal reasoning that because the alleged tort occurred on land before the plane reached Lake Erie, it was unnecessary to consider the question of maritime nexus.[31] Ignoring the question of the locality of the tort, the Supreme Court unanimously affirmed and held that the case was not cognizable in admiralty because the alleged wrong bore no "significant relationship to traditional maritime activity."[32]

## III. Recent Decisions

Various lower federal court decisions demonstrate the uncertainty surrounding the applicability of the locality-plus test of *Executive Jet* in general admiralty tort jurisdiction aside from aviation torts. In *Maryland v. Amerada Hess Corp.*,[33] an oil transfer line that linked the Hess plant with a tanker ruptured, causing pollution of the Baltimore Harbor. Both Hess and the owner of the tanker were sued in admiralty by Maryland's State Department of Natural Resources. Following denial by the federal district court of its motion to dismiss,[34] defendant Hess moved for relief from the order on the ground that *Executive Jet's* specific rejection of the locality test bound the district court. The court disagreed, found that *Executive Jet* held the locality test to be insufficient merely in airplane accident cases,[35] and held that this case fell within the court's admiralty jurisdiction. The district court reasoned that only when there is a " 'perverse' or 'casuistic borderline situation' " is a deviation required from the traditional locality test.[36]

30. The district court reasoned that the alleged wrong occurred when the plane ingested the birds over land; therefore, the first criterion of locality was not met. Alternatively, the court found no relationship to traditional maritime activity because the operative facts concerned the dangers for land-based aircraft when using runways for takeoff. 409 U.S. at 251-52.

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

32. 409 U.S. at 268. *See* note 7 *supra*.

33. 356 F. Supp. 975 (D. Md. 1973).

34. 350 F. Supp. 1060 (D. Md. 1972).

35. 356 F. Supp. at 976.

36. 356 F. Supp. at 977. The Supreme Court in *Executive Jet* had reasoned that the locality test usually worked well since most tortious occurrences on navigable waters involve traditional maritime activities. The words "perverse and casuistic borderline situations" were used by the Court to describe when the locality test causes problems. 409 U.S. at 255.

In *Adams v. Montana Power Co.*,[37] the District Court for the District of Montana recognized no binding authority in *Executive Jet* for the use of the locality-plus test in nonaviation cases, but nonetheless held, by using a modified version of the locality test, that admiralty jurisdiction did not exist. Plaintiff's decedent had drowned when a discharge of water from defendant's dam on the Missouri River caused his small boat to overturn. Because local dams bounding the stretch of river where the accident occurred had reduced river commerce to that of any inland lake, defendant contended that lack of traditional maritime activity should cause the court to follow the policy of *Executive Jet* and adopt the locality-plus test, which would bar the plaintiff's suit. The court began its analysis by noting that the locality test granted admiralty jurisdiction when the tort occurred on navigable water. The court felt, however, that the Supreme Court's refusal to apply mechanically the locality test in *Executive Jet* diminishes the binding force of the term "navigable water" and allows the courts to make a wider inquiry into the admiralty tort jurisdictional problem.[38] After recognizing that the purpose of admiralty is to serve the needs of maritime commerce, the court claimed that "navigable water" is simply a useful term to describe where such commerce takes place.[39] Therefore, the court felt that water is not "navigable" for the purpose of the locality test unless it can support traditional maritime activity,[40] which the stretch of river in this case could not. Consequently, admiralty jurisdiction failed under the court's version of the locality test because the act did not occur on navigable water as redefined.

The Courts of Appeals for the Fourth and Fifth Circuits have relied more directly on the Supreme Court's holding in *Executive Jet*. The plaintiff in *Crosson v. Vance*,[41] a water skier, sued his towboat driver in admiralty for negligent operation of the boat on navigable waters. In dismissing the complaint in admiralty, the Court of Appeals for the Fourth Circuit specifically recognized the binding authority of *Executive Jet's* rejection of the strict locality rule[42] and, noting the Supreme Court's explicit disapproval of the

37. 354 F. Supp. 1111 (D. Mont. 1973).
38. 354 F. Supp. at 1111.
39. 354 F. Supp. at 1112.
40. *See* note 3 *supra*.
41. 484 F.2d 840 (4th Cir. 1973).
42. 484 F.2d at 841. A more recent Fourth Circuit case reiterates the view of

grant of admiralty jurisdiction in a previous case with similar facts, determined that no significant traditional maritime activity existed.[43] In *Kelly v. Smith*,[44] the Court of Appeals for the Fifth Circuit, on the other hand, used *Executive Jet* as persuasive authority[45] in conjunction with a prior Fifth Circuit case[46] in upholding the lower court's judgment for the plaintiffs in admiralty. *Kelly* involved an action for injuries sustained by poachers who were fired on by defenders of a private hunting preserve on an island in the Mississippi River. The court, concluding that maritime locality is no longer sufficient and that a significant relationship to traditional maritime activity is necessary, found the dangers to

*Crosson*. Onley v. South Carolina Elec. & Gas Co., No. 73-1354 (4th Cir., Dec. 7, 1973). A recent Ninth Circuit case also exhibits a definite understanding that *Executive Jet* mandates a locality-plus test across the breadth of admiralty jurisdiction. In *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973), plaintiffs sought to recover for certain damages to their pleasure craft that resulted from the 1969 Santa Barbara oil spill. A three-judge panel of special masters held that the case was within maritime law. On appeal, the Ninth Circuit stated that the finding of locality would have been dispositive of the jurisdictional issue had not the *Executive Jet* decision been handed down. 485 F.2d at 256. In affirming the special masters' decision, the court found traditional maritime activity, but said that if it had not, *Executive Jet* would "compel a reversal." 485 F.2d at 257.

43. 484 F.2d at 842. The similar case in which admiralty jurisdiction was allowed is *King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963) (injury to water skier through negligence of towboat operator).

44. 485 F.2d 520 (5th Cir. 1973).

45. Two additional cases consider *Executive Jet* simply as guidance or persuasive authority outside the area of aviation torts in admiralty. Rubin v. Power Authority, 356 F. Supp. 1169 (W.D.N.Y. 1973); Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973).

46. Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (locality is not an absolute requirement for the invocation of admiralty jurisdiction, but the facts and circumstances of each claim must have a substantial connection with maritime activities or interests). This is known as the "maritime nexus" or "maritime connection" test. Only one other American case adopts the maritime nexus rule. Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968). For articles supporting this test see *Guidelines, supra* note 9, and Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQUESNE L. REV. 1 (1968). The maritime connection test has also suffered substantial criticism in the past. *See, e.g.*, Note, *Admiralty—Tests of Maritime Tort Jurisdiction*, 44 TUL. L. REV. 166 (1969). Except possibly in the Fifth Circuit, there is no movement in the courts at this time that shows a willingness to take such a large step as adopting the maritime nexus test in the admiralty tort area. *See* note 47 *infra*.

maritime commerce presented in the case sufficient to justify invocation of federal admiralty jurisdiction.[47]

## IV. Toward More Proper Bounds for Admiralty Tort Jurisdiction

The Supreme Court's adoption in *Executive Jet* of the locality-plus nexus test for aviation torts in admiralty has placed in doubt the jurisdictional standard for the entire area of admiralty torts. The Court's statement that it is far more consistent with the purpose and history of admiralty tort jurisdiction to require a significant relationship to traditional maritime activity,[48] coupled with the absence of subsequent Supreme Court decisions that might interpret more explicitly the impact and applicability of the *Executive Jet* holding to nonaviation cases, has left the lower courts confused. The cases after *Executive Jet*, therefore, have variously interpreted the binding nature of that case in nonaviation admiralty claims and have reached differing conclusions concerning the continued viability of the locality test. Despite its superficial retention of the locality test, *Maryland v. Amerada Hess* implicitly accepted the locality-plus rule. As in most actions with maritime locality, traditional maritime activity existed here, and there was no need to go beyond the locality test. *Amerada Hess* found the locality-plus test necessary only in perverse and casuistic borderline situations,[49] but only in these situations, in which the tort is not obviously part of traditional maritime activity, is locality-plus actually needed. Therefore, unless "perverse and casuistic" is interpreted very strictly, the *Amerada Hess* standard differs little in effect from the locality-plus rule itself. While the court in *Adams v. Montana Power Co.* similary claimed to retain the locality test, it redefined the term "navigable water" to mean

47. 485 F.2d at 524. In *Kelly* it is not entirely clear in the majority decision whether in the Fifth Circuit locality-plus is necessary or whether maritime nexus alone will suffice to grant admiralty jurisdiction in nonaviation cases. Judge Morgan's dissenting opinion seems to be of help, as he states that "[e]veryone agrees that 'locality plus' is the test in this case." 485 F.2d at 527. He then, however, adds that the court is not faced in *Kelly* with the question whether maritime locality is necessary if the substantial maritime connection is present. 485 F.2d at 527 n.1. This leaves the present view of the Fifth Circuit unclear in this area.

48. 409 U.S. at 268.

49. *See* note 36 *supra* and accompanying text.

water in which traditional maritime activity occurs. Under *Adams*, therefore, a tort *not* involving traditional maritime activity but occurring on such "navigable water" would qualify for admiralty jurisdiction, while the opposite would be true under the locality-plus test. The *Adams* test, then, is indeed a locality test, albeit one tempered with a redefined term that partially injects maritime nexus into the traditional rule and whose application would only sometimes be the same as that of the locality-plus test.[50] Taking the opposite view of *Adams* and *Amerada Hess* as to the scope of the *Executive Jet* holding are cases such as *Crosson v. Vance*, which would apply locality-plus throughout admiralty tort jurisdiction using *Executive Jet* as mandatory authority. In *Crosson*, the Fourth Circuit interpreted *Executive Jet* as a selection of the locality-plus rule generally and as a determination that the crash of a land-based plane on an intracontinental flight was not cognizable under the new rule. Taking this approach the *Crosson* court was then able to apply the locality-plus rule and use the Supreme Court's specific disapproval of injured swimmer cases in admiralty[51] to decide whether traditional maritime activity existed. Somewhere in between the two extreme interpretations of *Executive Jet's* scope are such cases as *Kelly v. Smith*, which adopted the locality-plus rule but used *Executive Jet* only as persuasive authority.

A common and significant thread running through all these cases is the avoidance by all the courts of mechanical application of the locality test. Such a clear trend is a positive development since it recognizes, as the Supreme Court did in *Executive Jet*, that the strict locality test is at odds with the purpose of admiralty itself. Notwithstanding the influence of *Executive Jet* on all of these adjudications, a serious lack of uniformity has arisen, greater than that which existed with locality alone, because the courts no longer have an established standard, and in their search for a new standard have evinced different rates of change. The disunity is not as great as when some courts applied strict locality and others locality-plus (the situation before *Executive Jet*), but it is still at

50. This was the case in *Adams*. Admiralty jurisdiction would not be granted under the locality-plus test because of a lack of traditional maritime activity, and the result is the same using the *Adams* test because traditional maritime activity does not occur on the water in question.

51. *See* note 43 *supra* and accompanying text.

an undesirable level. While there is a problem with uniformity when any rule must be applied on a case-by-case basis in different courts, the problem is heightened to an unreasonable level when more than one rule is used for the resolution of the same question because there will be varying applications of each rule and further proliferations of new rules. This is the case at hand. Although the situation might resolve itself, hopefully the Supreme Court will soon realize the effect of its holding in *Executive Jet*, have an opportunity to make clear the scope of the locality-plus test, and do so by giving the new test application across the entire area of admiralty torts. By requiring a nexus to traditional maritime activity, the locality-plus test as a general standard would establish a higher level of uniformity than exists at present while also providing a more proper delimitation on the boundaries of admiralty tort jurisdiction.[52]

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52. As to further refinement to keep admiralty tort jurisdiction within its proper bounds, the Fifth Circuit has suggested several factors to determine whether a substantial maritime nexus exists. *See* Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973); Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972). *See also Guidelines, supra* note 9. The factors are likely to vary from court to court. Even in *Kelly* the judges could not fully agree on the proper factors. Also, application of the factors will vary. Certainly some jurists would differ with the *Kelly* court's finding that the shooting of poachers in a small boat possessed a substantial maritime nexus. The development in this area will probably be similar to that of contract jurisdiction in admiralty in that over time certain types of cases will be recognized as not possessing a sufficient maritime nature to invoke jurisdiction.