Vanderbilt Law Review

Volume 27
Issue 2 *Issue 2 - March 1974*

Article 5

3-1974

Recent Developments

Author Unidentified

RECENT DEVELOPMENTS

Admiralty Tort Jurisdiction—Tort Claims Not Within Admiralty Jurisdiction Unless Requisite Maritime Nexus Exists

I. INTRODUCTION

Article III of the Constitution[1] grants exclusive jurisdiction in admiralty to the federal courts. The scope of this jurisdiction over tort claims traditionally has depended upon the situs of the tort—whether it occurred on land or on navigable water.[2] Although most American courts have adhered to this "strict locality" test, it has received frequent criticism as manifested by significant judicial and legislative modifications over the years.[3] Most judicial challenges to the test have focused on its failure to require a connection between the tortious occurrence and the traditional problems of maritime commerce.[4] A majority of courts ostensibly continued to apply the locality standard until 1972 when the United States Supreme Court for the first time explicitly addressed the issue of whether maritime tort jurisdiction turned solely on maritime locality in *Executive Jet Aviation, Inc. v. City of Cleveland*[5] and held

1. U.S. CONST. art. III, § 2 provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." Professor Black has suggested that Article III, § 2 "evidences a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry . . . [since] the subject matter is the only one specifically singled out for attention in the jurisdiction section. . . ." Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 262 (1950).

2. Admiralty jurisdiction has been applied only to occurrences on *navigable* water. *See* notes 14-17 *infra* and accompanying text.

3. *See, e.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967) (action for injuries to diver from public pier not cognizable in admiralty); Camphell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903) (tort must have a maritime nature before action is cognizable in admiralty); Extension of Admiralty Act, 46 U.S.C. § 740 (1970).

4. *See, e.g.*, Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (action for injuries resulting from auto collision on floating landing not within admiralty); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967) (action for injuries to diver from public pier not cognizable in admiralty); Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968) (denying jurisdiction in case in which a forklift dropped into water when hoom of crane broke in process of raising forklift); McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961) (action for injuries to swimmer at public beach not within admiralty jurisdiction).

5. 409 U.S. 249 (1972).

that the wrong must bear a significant relationship to traditional maritime activity[6] for the federal courts to have admiralty juridiction. Subsequently, in *Kelly v. Smith*,[7] the Fifth Circuit implemented the new test articulated by the Supreme Court by analyzing all the circumstances relating to an alleged tort in terms of four relevant factors to determine whether a substantial maritime relationship existed.[8] Although the court indicated that it had applied the *Executive Jet* test in finding admiralty jurisdiction, its factor analysis nevertheless seems to have placed undue emphasis on the locality of the tort.

II. Development of the Locality Test and Its Shortcomings

Historically, the need for uniform administration of laws governing the unique customs and traditions of maritime commerce precipitated the development of admiralty courts.[9] The provision in Article III for exclusive federal jurisdiction in admiralty and the implementing provisions of the Judiciary Act of 1789[10] reflect the early American desire for uniformity in this area. Modern litigants find admiralty jurisdiction attractive not only because it affords a uniform body of law, but also because it provides numerous procedural and substantive advantages. It provides, *inter alia*, access to federal courts in the absence of a federal question or diversity of citizenship[11] and offers special substantive rules that can aid a litigant in presenting his case and recovering for his injury.[12] Before a

6. *Id.* at 268.

7. 485 F.2d 520 (5th Cir. 1973).

8. These factors were largely derived by the court from its earlier opinion in Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1127 (5th Cir. 1972). *See* text accompanying note 58 *infra*.

9. Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1127 (5th Cir. 1972); McGuire v. City of New York, 192 F. Supp. 866, 871 (S.D.N.Y. 1961); Pelaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 Duquesne L. Rev. 1, 42-43 (1968). For a discussion of the historical development of admiralty jurisdiction see DeLovio v. Boit, 7 F. Cas. 418, 419-31 (No. 3,776) (C.C.D. Mass. 1815). *See also* 1968 U. Ill. L.F. 95, 96-97.

10. Ch. 20, § 9, 1 Stat. 73, 76-77.

11. *See, e.g.*, Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966) (admiralty claim allows access to federal courts despite lack of diversity between the parties); Note, *Admiralty Tort Jurisdition and Aircraft Accident Cases: Hops, Skips and Jumps into Admiralty*, 38 J. Air L. & Com. 53, 54 n.9 (1972).

12. The special rules include the following: contributory negligence is not a bar to recovery, Hornsby v. Fish Meal Co., 431 F.2d 865, 867 (5th Cir. 1970) (comparative negligence rule used in admiralty litigation of mid-air collision); Note, *supra* note 11; assumption of risk is often not recognized as a defense, King v. Testerman, 214 F. Supp. 335, 336 (E.D. Tenn. 1963) (action by injured water skier against boat operator held cognizable in admiralty where assumption of risk is inapplicable); 1968 U. Ill. L.F. 95 n.1; and defendant is afforded some

litigant can take advantage of these benefits, however, his claim must satisfy the admiralty jurisdictional requirements. The strict locality test traditionally has been applied to determine whether a tort claim is cognizable in admiralty.[13] One of the early articulations of the locality standard appears in Justice Story's opinion in the leading case of *Thomas v. Lane*,[14] in which the court held that a libel for assault and battery and false imprisonment was not cognizable in admiralty because of failure to allege a maritime locality.[15] In 1886 the Supreme Court definitively set forth the strict locality test in *The Plymouth*,[16] a case concerning a suit for damages to a wharf-front storehouse resulting from a fire that originated aboard a ship moored alongside the wharf. Applying the strict locality test, the Court held that despite the tort's maritime origin its substance and consummation occurred on land, and the suit was not within the admiralty jurisdiction of the federal courts.[17] The test expressed in *The Plymouth* has been accepted by the weight of American authority,[18] but its mechanical application has produced seemingly irreconcilable decisions based on attenuated distinctions,[19] and consequently has engendered frequent criticism by commentators and

protection through liability limitations, Crenshaw, *Airplanes in the Admiralty Jurisdiction: A Short History*, 18 S.C.L. REV. 572, 573-75 (1966). *See generally* Pelaez, *supra* note 9, at 38.

13. The test for jurisdiction over contract claims has always been whether the subject matter has a maritime character. Philadelphia. W. & B.R.R. v. Philadelphia & Havre de Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859); DeLovio v. Boit, 7 F. Cas. 418, 444 (No. 3,776) (C.C.D. Mass. 1815).

14. 23 F. Cas. 957 (No. 13,902) (C.C.D. Me. 1813).

15. Much of the outgrowth of the locality rule stems from Justice Story's early analysis of admiralty jurisdiction. In *Thomas* he stated: "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act." *Id.* at 960. Similarly, in DeLovio v. Boit, 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815), he described maritime torts as being "necessarily bounded by locality." *Id.* at 444.

16. 70 U.S. (3 Wall.) 20 (1865).

17. "[T]he true meaning of the rule of locality in cases of marine torts . . . [is] that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction." *Id.* at 34-35.

18. In Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), an action brought by a longshoreman who was injured on a pier while loading cargo, the Court noted that the vast majority of cases had been decided according to the strict locality test and supported its determination that jurisdiction was lacking by citing 39 supporting cases. *Id.* at 205 n.2.

19. For example, jurisdiction was found lacking in the case of a longshoreman knocked from a wharf into navigable water by a loaded sling. T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928). The Court held an action within admiralty jurisdiction, however, in a case in which a longshoreman unloading a ship in navigable water was knocked from the deck onto the wharf by the ship's hoist. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). *Compare* Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), *with* The Admiral Peoples, 295 U.S. 649 (1935).

numerous legislative and judicial modifications. Scholarly criticism of locality as the exclusive determinant of admiralty jurisdiction had occurred even before the Supreme Court's decision in *The Plymouth*.[20] Agreeing with earlier critics that jurisdiction should depend upon a maritime nexus, several recent commentators have suggested that a nexus requirement actually was satisfied *sub silentio* in the early cases producing the same result that would have been reached under a "locality plus maritime nexus" test.[21] The most cogent criticism of the locality test has been that its failure to take into account the relationship of the tortious occurrence with maritime commerce[22] renders the test fortuitous and arbitrary. Legislative dissatisfaction with results reached under the strict locality test was manifested in the Extension of Admiralty Act,[23] which obviated the specific holding of *The Plymouth* by providing that claims for personal injury or property damage on shore caused by a vessel on navigable water are actionable in admiralty.[24] Another legislative modification was the Death on the High Seas Act (DOHSA),[25] which creates a wrongful death action in admiralty for

20. E. BENEDICT, THE AMERICAN ADMIRALTY, ITS JURISDICTION AND PRACTICE § 308 (3d ed. 1894). In this treatise Judge Benedict questioned the propriety of the strict locality test: "It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels, to which the admiralty jurisdiction, in cases of contracts, applies." *Id.*

21. *See* Comment, *Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters*, 65 COLUM. L. REV. 1084, 1091 (1964); Comment, *Aviation Challenges Admiralty Jurisdiction: Sink or Swim in the Sea of Uncertainty*, 35 J. AIR. L. & COM. 616, 621 (1969). *See also* Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967).

22. *See* Black, *supra* note 1, at 264; *cf.* Pelaez, *supra* note 9, at 41-42 (advocating complete abandonment of any locality requirement). *Contra*, Note, *Admiralty-Jurisdiction over Airplane Crashes on Navigable Waters*, 18 WAYNE L. REV. 1569, 1583 (1972); Note, *supra* note 11, at 64.

23. 46 U.S.C. § 740 (1970) provides, in part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

24. For a discussion of this point see 1968 U. ILL. L.F. 95. *See* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1123 (5th Cir. 1972).

25. 46 U.S.C. §§ 761-68 (1970). Section 761 provides: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty. . . ." For an explanation of DOHSA see Note, *Wrongful Death at Sea—The Death on the High Seas Act*, 51 CALIF. L. REV. 389 (1963).

In 1970 the Supreme Court in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), an action for wrongful death aboard a vessel within a marine league from shore, complemented DOHSA by creating an action for wrongful deaths that occur on navigable waters

deaths occurring at sea more than one marine league from shore. Although this statute does not address specifically the propriety of the locality standard, its broad language has allowed the inclusion of suits of a questionable maritime nature within admiralty jurisdiction. Judicial questioning of the strict locality test first appeared in *Campbell v. H. Hackfeld & Co.*,[26] in which a stevedore was injured while loading a vessel anchored in navigable water. The Ninth Circuit construed the locality test as articulated in *The Plymouth* to require that the tort have a maritime nature before the action can be brought in admiralty.[27] Eleven years later in *Atlantic Transport Co. v. Imbrovek*[28] the Supreme Court declined to determine the soundness of the Ninth Circuit's interpretation; neither denouncing nor endorsing the maritime-nexus approach, the Court remarked that even if a nexus were required, the libelant had alleged a sufficiently maritime wrong to satisfy it.[29] In recent years judicial reluctance to adopt a maritime-nexus requirement has diminished. In *McGuire v. City of New York*,[30] a federal district court held that an action for injuries sustained by a swimmer at a public beach was not within admiralty jurisdiction because admiralty law historically was not concerned with noncommercial activities.[31] In adopting a locality plus maritime-nexus test, the court stated that the occurrence of a tort on navigable waters was only prima facie evidence of admiralty jurisdiction.[32] Similarly, in *Chapman v. City of Grosse Pointe Farms*,[33] an action brought by a swimmer for injuries sustained while diving from a public pier into shallow water, the Sixth Circuit held that in addition to a maritime locality, admiralty requires a relationship between the alleged wrong and some maritime service, navigation, or commerce on navigable waters.[34] More re-

within the DOHSA exclusionary limit. The Court overruled *The Harrisburg*, 119 U.S. 199 (1886), in which it had been held that maritime law does not provide a cause of action for wrongful death. 398 U.S. at 409. DOHSA and *Moragne* together provide a vehicle for wrongful death recovery in admiralty when the jurisdictional requirements of admiralty are satisfied.

26. 125 F. 696 (9th Cir. 1903).

27. *Id.* at 697. In arriving at its conclusion the *Campbell* court relied on Justice Story's language in *DeLovio v. Boit*—the same as was used in *The Plymouth* in setting forth the strict locality test. *See* note 15 *supra.*

28. 234 U.S. 52 (1914).

29. *Id.* at 61.

30. 192 F. Supp. 866 (S.D.N.Y. 1961).

31. The court noted that the locality test was developed as a rule of limitation and as a means of limiting the scope of admiralty jurisdiction; thus, libelant should not be able to expand jurisdiction through its use. *Id.* at 869.

32. *Id.* at 870-71.

33. 385 F.2d 962 (6th Cir. 1967).

34. *Id.* at 966.

cently, in *Peytavin v. Government Employees Insurance Co.*,[35] the Fifth Circuit considered whether admiralty jurisdiction existed over an action for personal injuries sustained in an automobile collision that occurred on a floating ferry landing on navigable water. After criticizing both the strict locality test and the locality plus maritime connection test—the former for its susceptibility to differing applications and the latter for combining the imprecision of the locality standard and the difficulty of determining what constitutes a minimum maritime connection sufficient to invoke admiralty jurisdiction[36]—the court concluded that no *substantial* maritime connection was shown by an analysis of the case's relevant factors and consequently denied admiralty jurisdiction.[37]

III. Aviation Torts and Executive Jet Aviation, Inc. v. City of Cleveland

The growth of the aviation industry has posed special problems as many litigants have sought to bring claims arising from aviation accidents within the scope of admiralty jurisdiction. The courts initially refused to extend this jurisdiction to cover aviation torts because of doubts that the strict locality test was properly applicable and in deference to admiralty's traditional function of promoting seafaring commerce. In the 1914 case of *The Crawford Bros. No. 2*,[38] a federal district court declined to exercise jurisdiction over an action resulting from the crash of an airplane into navigable waters on the ground that this new mode of transportation posed novel and complex problems outside the traditional scope of admiralty. Although a few courts found that a seaplane is a "vessel" subject to admiralty jurisdiction while it is engaged in seagoing functions,[39] the

35. 453 F.2d 1121 (5th Cir. 1972).

36. *Id.* at 1126.

37. *Id.* at 1127. Several other pre-*Executive Jet* decisions appear to have adopted a maritime-nexus requirement *sub silentio*. *See, e.g.*, O'Connor & Co. v. City of Pascagoula, 304 F. Supp. 681, 683 (S.D. Miss. 1969) (granting jurisdiction over an action for allegedly tortious interference with loading and transportation of explosives by vessel and interference with a shipping contract); Smith v. Guerrant, 290 F. Supp. 111, 114 (S.D. Tex. 1968) (denying jurisdiction in a case in which a forklift dropped into water when boom of crane broke in process of raising forklift).

38. 215 F. 269, 271 (W.D. Wash. 1914).

39. *See, e.g.*, United States v. Northwest Air Serv., Inc., 80 F.2d 804 (9th Cir. 1935); Reinhardt v. Newport Flying Serv. Corp., 232 N.Y. 115, 118, 133 N.E. 371, 372 (1921). *Contra*, United States v. Peoples, 50 F. Supp. 462 (N.D. Cal. 1943) (seaplane not a vessel); Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939) (seaplane not a vessel). *But cf.* United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950) (airplane not a vessel within admiralty jurisdiction).

greatest impetus for recognizing aviation torts in admiralty was *Choy v. Pan-American Airways Co.*,[40] in which a federal district court interpreted DOHSA[41] to cover a wrongful death action against an airline—a position that has been adopted by a majority of the courts confronted with the issue.[42] In a later case, *Wilson v. Transocean Airlines*,[43] another federal district court held that an action for wrongful death resulting from an airplane crash on the high seas was cognizable in admiralty under DOHSA because jurisdiction depended only upon the locality of the tort and not upon the nature or cause of it.[44] Then, in *Weinstein v. Eastern Airlines, Inc.*,[45] a wrongful death action not within the province of DOHSA,[46] the Third Circuit, analogizing air travel to maritime commerce on the basis of their common transportation function and noting that the plight of a downed airplane is similar to that of a sinking ship,[47] held that the action was within admiralty jurisdiction because the tort had a maritime locality. The *Weinstein* holding not only has been adopted by courts faced with the same issue,[48] but in some cases it has been greatly expanded.[49] Thus, despite the continuing debate

40. 1941 A.M.C. 483 (S.D.N.Y. 1941). The court did not discuss specifically the locality test.

41. *See* note 25 *supra* and accompanying text.

42. *See, e.g.*, D'Aleman v. Pan Am. World Airways, Inc., 259 F. 2d 493, 495-96 (2d Cir. 1958) (personal representative maintained suit under DOHSA for death caused by shock from witnessing engine failure; DOHSA interpreted as applying to wrongful death in the airspace over the high seas); Lacey v. L.W. Wiggins Airways, Inc., 95 F. Supp. 916, 918 (D. Mass. 1951) (DOHSA construed to apply to airplane crash); Wyman v. Pan Am. Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd*, 267 App. Div. 947, 48 N.Y.S.2d 459, *appeal denied*, 293 N.Y. 878, 49 N.Y.S.2d 271 (1944) (action under DOHSA for mid-ocean airplane crash). *But see* Noel v. Linea Aeropostal Venzolana, 247 F.2d 677, 680 & n.4 (2d Cir. 1957) (questioning the constitutionality of such constructions of DOHSA).

43. 121 F. Supp. 85 (N.D. Cal. 1954).

44. "Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred." *Id.* at 92. The court further noted that "the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action." *Id.* at 92 & n.27.

45. 316 F.2d 758 (3d Cir. 1963).

46. The action was not within DOHSA hecause it stemmed from an airplane crash into state territorial waters.

47. 316 F.2d at 763.

48. *See, e.g.*, Harris v. United Air Lines, Inc., 275 F. Supp. 431 (S.D. Iowa 1967) (action arising from crash into state territorial waters of Lake Michigan). *See also* Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (action maintained by swimmer injured by a surf board), citing *Weinstein* for its use of the strict locality test.

49. *See, e.g.*, Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971) (wrongful death action for crewmember's fall from jet airplane into navigable water cognizable in admiralty); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965) (admiralty jurisdiction covers action for injury resulting from airplane's jolting while in airspace over Atlantic Ocean).

concerning the appropriate test for determining admiralty jurisdiction, the strict locality test was accepted by most courts in aviation as well as nonaviation cases.

In *Executive Jet*, petitioner airlines brought an action in admiralty to recover damages for the negligent loss of a jet plane, alleging that respondents'[50] negligence in failing to clear the runway or give adequate warning caused the plane to collide with a flock of seagulls on takeoff and consequently to crash into the adjacent Lake Erie. Petitioner contended that the action was within the federal court's admiralty jurisdiction[51] because the damage occurred on navigable water. Respondents asserted, however, that the suit was not within admiralty jurisdiction because the tort occurred on initial impact—when the plane struck the birds—and because petitioner's activities did not have a sufficient relationship with maritime commerce. The Supreme Court[52] initially discussed the historical development of the strict locality test and the serious difficulties that had resulted from its mechanical application to untraditional classes of maritime torts. The Court noted that the results of its application were inconsonant with the purposes of admiralty law. The Court further considered the numerous judicial and legislative exceptions to the test, especially in situations in which the tort bore a relationship to maritime commerce or navigation but had no maritime locality, as evidence that the requirement of a maritime nexus often is more sensible than a strict application of the locality standard. Proceeding to a consideration of the propriety of determining admiralty jurisdiction in aviation cases by relying on the locality test, the Court recognized that the crash of an airplane into navigable water is wholly fortuitous, particularly during intracontinental flights, and that the precise location at which a tort occurs is very difficult to determine in cases of air travel. The Court concluded, therefore, that the requirement of a significant maritime nexus is a more practical guide in determining admiralty jurisdiction in aviation

50. Named as defendants were the air traffic controller, the airport manager, and the City of Cleveland.

51. Jurisdiction was grounded on 28 U.S.C. § 1333 (1) (1970), which provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty of maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Petitioner's only access to federal court was through admiralty because there was no diversity of citizenship or federal question.

52. In an unreported opinion, the District Court for the Northern District of Ohio had applied a locality plus maritime-nexus test and found that neither requirement was satisfied. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 251-52 (1972). The Court of Appeals for the Sixth Circuit had affirmed solely on the basis of the strict locality test. 448 F.2d 151, 154 (1971).

tort cases. Continuing its analysis, the Court acknowledged the similar problems faced by a downed airplane and a sinking ship, but reasoned that the inherent differences in the two modes of transportation render inappropriate the application to aviation torts of rules developed to deal exclusively with seagoing vessels. Finally, the Court noted that if uniformity in the treatment of aviation accidents is needed, the responsibility lies with Congress to act under its commerce power. Thus, the Court concluded that neither the crash of an intracontinental airplane into navigable water nor the occurrence of the negligent act while the plane is in flight establishes a maritime nexus sufficient to invoke admiralty jurisdiction.

IV. KELLY V. SMITH

In *Kelly*, plaintiff hunters, who were the pilot and passengers of an outboard motorboat on the navigable waters of the Mississippi River, brought an action for assault and battery for personal injuries sustained from rifle shots fired from shore by defendant caretakers[53] during plaintiffs' sudden departure from a privately owned island.[54] Plaintiffs brought the suit in federal district court more than five years after the incident, alleging diversity of citizenship and admiralty jurisdiction. Defendants contended that the action should be dismissed because diversity actions are barred by a Mississippi one-year statute of limitations for assault and battery actions[55] and because admiralty jurisdiction was lacking. After a nonjury trial, the district court rendered judgment for plaintiffs.[56] On appeal,[57] the Fifth Circuit, considering the controverted issue of admiralty jurisdiction, discussed the recent adoption of the maritime-nexus re-

53. Named as defendants were the owner of the island, an Arkansas land management corporation to which the owner had granted a license for exclusive hunting rights on the island, a hunting club that bad been the hunting rights licensee prior to the corporation, the caretaker, and bis assistant.

54. Plaintiffs, residents of Mississippi, had crossed the river to engage in some clandestine deer hunting on a privately owned island on the west side of the main cbannel. They were fired upon as they attempted to flee by motorboat back across the river after they had been discovered by the island's caretaker and his assistant.

55. MISS. CODE ANN. § 732 (1942).

56. The previous licensee was dismissed on a motion for summary judgment and the owner of the island was absolved of liability at trial. The remaining defendants were held liable.

57. The allegation of diversity of citizenship failed because the Mississippi one-year statute of limitations for assault and battery actions was applicable. Kelly v. Smith, 485 F.2d 520, 523 (5th Cir. 1973). In addition to the issue of jurisdiction, defendants contended on appeal that plaintiffs were barred by laches, and defendant licensee contended that it could not be held vicariously liable for the acts of other defendants. The court resolved both of these issues in favor of plaintiffs. *Id.* at 526.

quirement by the Supreme Court in *Executive Jet* and by the Fifth Circuit in *Peytavin.* Relying on those two cases, the court concluded that maritime location alone is not sufficient to sustain admiralty jurisdiction and that the alleged wrong must bear a substantial relationship to traditional maritime activities. In determining what constitutes such a relationship, the court decided that the following factors were to be considered: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of the injury; and traditional concepts of the role of admiralty law.[58] The court reasoned that since the party most seriously injured was the pilot and the vehicle concerned was a watercraft, and since firearms and gunshot wounds are not precluded from having a maritime connection, then admiralty's traditional concern with providing remedies for injuries on navigable waters required the exercise of jurisdiction. Furthermore, on policy grounds the court argued that the wounding of a vessel's pilot on a major commercial waterway presents dangers sufficient for the assumption of admiralty jurisdiction. Accordingly, the court concluded that when occupants of a vessel on navigable water are injured from rifle shots fired by parties on shore, a significant relationship with maritime activity sufficient to invoke admiralty jurisdiction exists. The dissent[59] agreed that the four factors enumerated by the court were important considerations but argued that an additional factor—the state's interest—should also be weighed. Noting that state substantive rules would apply if the case had been decided on diversity grounds and that the action would have been barred by the state's statute of limitations, the dissent argued that admiralty jurisdiction should not be employed to deprive the state of its control over the action unless the federal interest in uniformity outweighs the state's interest in having its own laws applied. Emphasizing the essentially local nature of the tort and the traditional commercial purposes of admiralty law, the dissent concluded that there was no overriding federal interest in the matter.

V. The Meaning of the Maritime-Nexus Requirement

The Supreme Court's adoption of a maritime-nexus require-

58. *Id.* at 525. These factors were discerned largely from the court's analysis of the *Peytavin* opinion. *See* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1127 (5th Cir. 1972). For an analysis of *Peytavin* that discerns a slightly different list of factors see Note, *New Guidelines for Admiralty Tort Jurisdiction,* 48 Ind. L.J. 87, 99-103 (1972).

59. 485 F.2d at 527.

ment in *Executive Jet* represents a significant realignment of admiralty tort jurisdiction with the purposes it was originally designed to serve.[60] This realignment, however, was incomplete, for the Court left several problems unresolved.[61] First, the Court did not state clearly whether the new maritime-nexus requirement is a complete replacement of the strict locality test or merely an addition to it.[62] In many cases this ambiguity would not cause significant problems because the question whether the wrong had occurred on land or on navigable water would be easily determinable. But in other cases, such as actions for injuries to longshoremen,[63] there may be an obvious maritime connection but not a maritime locality. Despite this ambiguity, a number of lower courts apparently have construed *Executive Jet* as setting forth a "locality plus maritime nexus" test in which maritime locality is still a prerequisite to jurisdiction.[64] Secondly, the opinion fails to provide formal guidelines to be applied in determining when there is a significant relationship to traditional maritime activity. The peculiarity of the problems raised in aviation tort cases may partially explain the absence of guidelines that could be applied by lower courts in nonaviation cases. Although *Executive Jet* has been interpreted to apply to nonaviation

60. *See* note 9 *supra* and accompanying text.

61. *Executive Jet* raises a number of aviation-related problems that are beyond the scope of this Comment. For example, although the Supreme Court expressly left open the question whether an aviation tort will ever bear a relationship to traditional maritime activity sufficient to invoke admiralty, it indicated in a footnote that admiralty "clearly" is available to claimants under DOHSA. 409 U.S. at 271 n.20. This language suggests the possibility of the kind of fortuitous results for which the Court condemned the strict locality test. Whether an intracontinental flight from Miami to New York crashes within or without the one-marine-mile limit of DOHSA and whether such a crash results in death or personal injury are fortuitous circumstances. For a discussion of this and other problems of *Executive Jet* see Bell, *Admiralty Jurisdiction in the Wake of Executive Jet*, 15 ARIZ. L. REV. 67 (1973).

62. The Court declined to decide whether the tort had a maritime locality because its holding that there was no maritime nexus was dispositive of the case without deciding locality. The Court noted that the positions of both parties gave rise "to the problems inherent iu applying the strict locality test of admiralty tort jurisdiction in aviation accident cases." 409 U.S. at 267. This could he interpreted as a complete rejection of the locality standard at least in aviation cases. On the other hand, the court also stated: "[W]e have concluded that maritime locality *alone* is not a sufficient predicate for admiralty jurisdiction in aviation tort cases." *Id.* at 261 (emphasis added). This statement might suggest that the locality standard was retained.

63. *See* note 19 *supra.*

64. *See, e.g.*, Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 (9th Cir. 1973) (claims for property damage and for interference with right of navigation resulting from oil spill held cognizable in admiralty); Rubin v. Power Authority of New York, 356 F. Supp. 1169, 1171 (W.D.N.Y. 1973) (action brought against operator of power plant for deaths of divers in navigable water held not within admiralty jurisdiction); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683, 685-86 (D. St. Thom. & St. John 1973) (personal injury claim arising out of crash of seaplane during takeoff held cognizable in admiralty).

tort actions,[65] in at least one lower court case, the ambiguities of the opinion have contributed to a finding that "navigable waters" is no longer a necessary condition for admiralty jurisdiction[66]—a construction that the Supreme Court probably did not envision.

By listing a number of factors that should be considered in determining admiralty jurisdiction, the *Kelly* case filled some of the gaps left by *Executive Jet*. A close reading of the *Kelly* opinion suggests that it is not necessary that each factor evidence a maritime nexus, but rather that a weighing of *all* the factors show such a nexus. For example, the court did not find that the cause and nature of the injury or the instrumentality—the firearm—were related to maritime activity; it found only that they were "not so inherently indigenous to land as to preclude any maritime connection."[67] When these factors were balanced with the remaining ones, which the court found to be related to maritime activity, the court concluded that the total situation showed a maritime nexus. The *Kelly* formulation therefore contains a degree of flexibility necessary in an area in which so many borderline cases render an absolute test, such as the strict locality test, almost meaningless. Despite its significance as the first case to give definite content to the maritime-nexus requirement, *Kelly*'s balancing of factors, especially the interpretation and application of the "traditional concepts of the role of admiralty law" factor, is objectionable because of its undue emphasis on locality. The court found that the factual situation in *Kelly* came within those traditional concepts because admiralty traditionally has been concerned with providing remedies for those injured while traveling navigable waters.[68] While this reasoning is not incorrect, many courts and commentators would qualify it by adding that the injuries must bear a substantial relationship to maritime commerce or the shipping industry.[69] Another post-*Executive Jet* case, *Crosson v. Vance*,[70] offers some guidance on this point. In that case, the Fourth Circuit, construing *Executive Jet* as a rejection of earlier assumptions that injuries resulting from the operation of

65. *See* note 64 *supra*.

66. In Adams v. Montana Power Co., 354 F. Supp. 1111 (D. Mont. 1973), the court said that in *Executive Jet* the Supreme Court had "diminished the binding force of the label 'navigable water' and freed the courts to make a wider inquiry into the admiralty jurisdiction problem." *Id.* *See* Bell, *supra* note 61, at 78-79.

67. 485 F.2d at 526.

68. *Id.*

69. *See, e.g.*, Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967); McGuire v. City of New York, 192 F. Supp. 866, 870-71 (S.D.N.Y. 1961); Pelaez, *supra* note 9, at 42-43; Note, *supra* note 58, at 103-04.

70. 484 F.2d 840 (4th Cir. 1973).

small, noncommercial boats on navigable waters were within admiralty jurisdiction,[71] held that an action by an injured water skier against the allegedly negligent pilot of the towing boat was not cognizable in admiralty. This holding was based on the court's reasoning that the traditional concerns of admiralty—commercial vessels engaged in interstate and foreign shipping—were not related to the action before the court.[72] The dissenting judge in *Kelly* made this point by arguing that the federal interest in the uniform treatment of interstate and foreign commerce on water is not served by extending admiralty jurisdiction to include torts that occur on water but are of only a local nature.[73] The court's statement that the incident presented sufficient danger to maritime commerce appears to be an argument based on the *potentiality* of interference with commerce rather than on any actual interference. A further objection is that the list of factors in *Kelly* appears to be incomplete. The dissent correctly pointed out that the state was deprived of its control over an action for a tort essentially local in nature—a tort that would have been a purely local concern had it occurred on the island before plaintiffs could escape. In such cases, courts should consider the state interest as a factor, and when a significant relationship to maritime commerce or shipping does not exist, the state interest should be found to outweigh the minimal federal interest in the subject. Furthermore, the locality of the tort should be viewed as simply one of the factors to be taken into consideration in determining admiralty jurisdiction. The *Kelly* opinion suffers from the same ambiguity as does the *Executive Jet* opinion—a failure to clarify the status of the locality standard. In view of the Supreme Court's suggestion in *Executive Jet* that the situs of a tort often is completely fortuitous the locality standard should be given no more weight than each of the other factors listed by the Fifth Circuit. Some commentators have argued that the locality of the tort should be given no consideration at all.[74] Acceptance of a test based solely on maritime nexus, however, without any consideration of locality would be a step further than many courts are willing to go. Moreover, locality will normally be an important factual consideration since admiralty law concerns commerce that is related substantially

71. In Levinson v. Deupree, 345 U.S. 648 (1953), and Coryell v. Phipps, 317 U.S. 406 (1943), the Supreme Court, without specifically considering the issue of admiralty tort jurisdiction, applied admiralty rules to damages resulting from collisions of pleasure boats.

72. 484 F.2d at 840.

73. 485 F.2d at 527.

74. *See* Pelaez, *supra* note 9, at 41-43.

to *navigable water*. Therefore, retention of locality as one of many factors to be weighed is the preferable solution. The Fifth Circuit's factor analysis offers a sensible approach to the problem of determining whether an action is within admiralty jurisdiction, but a factor analysis should not be a mechanical operation leading to jurisdiction over an action for injuries simply because the tort fortuitously occurred on navigable waters and concerned passengers in a boat as in *Kelly*. The achievement of correct results will depend on the court's balancing of all relevant factors, with particular emphasis being placed on admiralty's traditional role of protecting and promoting maritime commerce and shipping.

VI. Conclusion

The frequent criticism of the strict locality test as the sole determinant of admiralty jurisdiction resulted in the Supreme Court's requirement of a significant relationship with traditional maritime activity in *Executive Jet*. The Court's failure to give lucid guidance to later courts in applying the new requirement in non-aviation cases was partially remedied by the Fifth Circuit's implementation of the maritime-nexus test utilizing a factor analysis in *Kelly*. For those courts that follow *Kelly*, this new interpretation of the test will provide needed guidelines for determining when admiralty should properly exercise jurisdiction. The courts should not limit themselves, however, to a consideration of the four factors as interpreted in *Kelly*, but should also balance the state interest in having its local law apply against the federal interest in uniformity. Although locality should be a factor to be considered, it should not be unduly emphasized. The paramount consideration should be that admiralty law is desigued primarily to deal with the problems of maritime commerce.