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CASE NOTES

Admiralty — Jurisdiction over Aviation Tort Claims

A significant relationship to traditional maritime activity supports admiralty jurisdiction over a wrongful death action arising from the crash of a Greek airliner into territorial waters during a flight from a Greek island to the mainland.


While vacationing in Europe Ms. Caroline Hammill Cagle, a United States citizen and resident of Virginia, made a side-trip to the Greek island of Corfu in the Mediterranean.1 In Corfu she purchased a one-way ticket to Athens, Greece, from the ticket office of the defendant airliner.2 On its approach to the Athens airport, the airliner crashed into Voula Bay within one mile of land, resulting in Ms. Cagle's death. Plaintiff, who is the administrator of decedent's estate, filed an amended complaint3 seeking damages for wrongful death from the Greek airline under four theories of recovery: 1) A common law cause of action for wrongful death under 28 U.S.C. §1332(a)(2);4 2) A wrongful death action based on the Montreal Agreement5 which raised the liabil-

1 This excursion to Corfu was not covered by the roundtrip ticket to Europe. The roundtrip ticket was purchased in the U.S. from a carrier other than the defendant.
2 The defendant also maintains a ticket office in Washington, D.C. — a fact stipulated to by both parties. Hammill at 831.
3 The amended complaint reflected the addition of the fourth theory of recovery in admiralty.
4 The statute provides:
   The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between — (2) citizens of a state, and foreign states or citizens or subjects thereof.
5 C.A.B. Order No. E23680 Docket 17325, Montreal Agreement C.A.B. 18900, May 13, 1966, found in 44 C.A.B. Rep. 819 (1960), [hereinafter referred to as Montreal Agreement]: This Agreement by the signatory members of IATA (International Air Transport Association), is a contractual increase in the damage limitations imposed by the Warsaw Convention and approved by the Civil Aeronautics Board on May 13, 1966. It is the direct result of economic pressures generated by a notice of denunciation of the Warsaw Convention served
ity limitations of the Warsaw Convention\(^6\) and the Hague Pro-
tocol;\(^7\) 3) A wrongful death action based on the common law the-
ory of Absolute Liability; and 4) An action for wrongful death
founded on general maritime law under 28 U.S.C. §1333(1)\(^8\) and
the Death on the High Seas Act 46 U.S.C. §§761 et seq.\(^9\)

Defendant moved to dismiss the amended complaint for lack of
jurisdiction and for failure to state a claim upon which relief might
be granted. \textit{Held}, motion denied: federal admiralty jurisdiction
exists and a wrongful death action is stated where the ill-fated
flight bore a significant relationship to the function traditionally
performed by maritime vessels, even though the crash occurred in
Greek domestic waters as opposed to the high seas.

The admiralty jurisdiction of the federal courts is grounded in
Article III, Section 2 of the Constitution, which declares that
“[t]he judicial power of the United States shall extend to . . .

\(^6\) 49 Stat. 3000 \textit{et seq.} (1934), T.S.No. 876 (effective Oct. 29, 1934). The
Warsaw Convention Treaty, adhered to by the United States in 1934, limited
damages to approximately $10,000 (current valuation) resulting from death or
injury caused by the negligence of an airline during air travel wherein the ad-
herents to the Treaty were ticketed nations of origin and destination.

\(^7\) This Treaty, concluded in 1955, became effective August 1, 1963 and in-
creased the maximum liability of the airlines from $10,000 to approximately
$18,000 (current valuation). Although the Hague Protocol was not ratified by
the United States it could in some situations, “apply to United States Citizens
as well as all people of the world, regardless of citizenship, since it depends
solely upon their ticketed ultimate places of origin or destination.” J. Kennelly,
Aviation Law: International Air Travel — A Brief Diagnosis and Prognosis, 56
Chicago Bar Record No. 4,178,180 (Jan-Feb. 1975).

\(^8\) The statute provides:
The district courts shall have original jurisdiction, exclusive of the courts
of the states, of: (1) Any civil case of Admiralty or maritime jurisdic-
tion, saving to suitors in all cases all other remedies to which they are
otherwise entitled.

\(^9\) The Death on the High Seas Act [hereinafter DOSHA] provides in
§ 761:
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 the exclusive benefit of the decedent's
wife, husband, parent, child or dependent relative against the vessel,
person, or corporation which would have been liable if death had not
ensued.
all Cases of admiralty and maritime jurisdiction." Congress also provided a specific forum for admiralty jurisdiction but failed to define its scope in the Judiciary Act of 1789 which merely provided:

The district courts shall have original jurisdiction exclusive of the courts of the states, of: (1) Any civil case of admiralty or maritime jurisdiction . . . .

Although Congress has occasionally altered the statutory scope of admiralty jurisdiction, the federal courts have, for the most part, been left with broad discretion in fixing the parameters of admiralty jurisdiction.

The crude boundaries of this jurisdiction were announced in the case of De Lovio v. Boit, where Mr. Justice Story concluded that American admiralty jurisdiction:

comprehends all maritime contracts, torts, and injuries: The latter branch [torts and injuries] is necessarily bound by locality; the former [contracts] extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business, or commerce of the sea.

Thus it was the maritime locality of the wrong that rendered a tort claim cognizable in admiralty. The traditional standard employed to determine whether a tort is "located" on navigable waters was laid down by the Supreme Court in The Plymouth:

[the true meaning of the rule of locality in cases of marine torts . . . [i]s that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. . . .

The growth of this "strict locality" test has been paralleled by the development of an alternative standard, under which a maritime

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11 Admiralty Extension Act of 1948, 62 Stat. 496, as amended, 46 U.S.C. § 740 (1971). This Act is intended to cover cases where a vessel on navigable waters causes damage to persons or property on land.
12 7 F.Cases 418 (No C.C.D. Mass. 1815).
13 Id. at 444.
14 70 U.S. (3 Wall.) 20, 34-35 (1866). This case involved the destruction of a wharf and a packing house by a fire that had begun on board ship then spread ashore. The Court held that a libel brought against the ship for the damage done ashore was not cognizable in admiralty.
15 Id. at 36.
locality plus a relationship or nexus to traditional maritime activity is required to invoke the admiralty jurisdiction in cases involving tort claims. Nevertheless, until Executive Jet Aviation v. The City of Cleveland, most courts adhered to a mechanical application of the "strict locality" rule and sustained admiralty jurisdiction despite a lack of any connection between the wrong and traditional forms of maritime commerce and navigation.

Although, "for the standard types of maritime torts, the traditional test has worked quite satisfactorily," the application of this test alone to determine admiralty jurisdiction in aviation negligence cases has presented a particularly difficult question for the courts. Complications arise when a body of law traditionally concerned with seagoing vessels is extended to a medium of transportation not contemplated during the evolution of that body of law. It is somewhat anomalous that admiralty courts should be given jurisdiction over a form of transportation which is usually designed and

16 The requirement for a "locality plus" or "maritime nexus" test was first considered by the United States Supreme Court in Atlantic Trans. Co. of W. Va. v. Imbrovek, 234 U.S. 52 (1914). The case involved an action for personal injuries sustained by the plaintiff aboard ship while he was unloading the vessel in the port of Baltimore. Since the maritime locality of the tort was conceded, the court found the action cognizable in admiralty but stated that:

. . . if more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. (Id. at 62).

This "locality plus" standard has since been employed by some courts to avoid the application of admiralty law to cases unrelated to traditional maritime activities. See e.g., McGuire v. City of New York, 192 F.Supp. 866 (S.D. N.Y. 1961) (Bather at public beach had no cause of action in admiralty for injury to hand caused by submerged rock); Peytavin v. Govt. Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (Admiralty jurisdiction denied for injuries plaintiff received in a rear end collision on a floating pontoon at a ferry landing).

17 409 U.S. 249 (1972) see note 27 infra.

18 7A. J. Moore, Federal Practice para. 325[3], at 3526 (2d ed. 1972) [hereinafter cited as Moore]. The Supreme Court has recognized the viability of the "strict locality" test as recently as Victory Carriers Inc. v. Law, 404 U.S. 202 (1971). The Court in holding that there was no admiralty jurisdiction over an injury to a longshoreman on a dock by stevedore-owned equipment issued a re-statement to the effect that it still recognized that locality determines maritime tort jurisdiction.

19 See e.g., Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (Admiralty jurisdiction applied in case of swimmer injured by surfboard); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (Admiralty jurisdiction applied in case concerning injuries to a water skier).

20 Executive Jet, supra, 409 U.S. at 254.

21 Seaplanes, which are subject to maritime rules of the road while they are
operated to avoid contact with the sea. It is hard to picture a ship "going down" in anything but water. Yet when a disabled aircraft "goes down" it is wholly adventitious whether it crashes on land or on water. Nevertheless, admiralty jurisdiction would be invoked under the "strict locality" test, accompanied by its full panoply of substantive maritime law. Since *Choy v. Pan-American Airways Co.*, it has been established and consistently held that a cause of action in admiralty for wrongful deaths arising from crashes of land-based aircraft occurring on the high seas (beyond one marine league from shore) exists under DOSHA.

A further extension of admiralty jurisdiction under general maritime law came in *Weinstein v. Eastern Airlines Inc.*, where in deciding a wrongful death action arising from the crash of a commercial jet in the navigable waters of Boston Harbor, the Court of Appeals for the Third Circuit applied the "strict locality" rule, notwithstanding that the crash occurred within Massachusetts territorial waters, thus rendering DOSHA inapplicable.

The Supreme Court has now clearly overruled *Weinstein* by its decision in *Executive Jet Aviation Inc. v. City of Cleveland*. The still on the water, have received varied treatment by admiralty courts: Reinhardt v. Newport Flying Service Corp., 232 N.Y. 115, 133 N.E. 371 (1921) (Cardozo, J.: "vessels" while afloat, but not while in the air); U.S. v. Cordova, 89 F.Supp. 298 (E.D. N.Y. 1950) (Not a vessel at any time); Hark v. Antilles Airboats, note 38 infra. (Admiralty jurisdiction until seaplane reaches (VMC) minimum control speed).

Admiralty jurisdiction benefits a claimant in that he has access to federal district court without a showing of diversity of citizenship or an amount in controversy of at least $10,000. He is not limited by venue restrictions but may bring his action in rem (against the vessel) or in personam (against the owner) in any district in which he can attach or garnish the credits and effects of the defendant or serve process on him.

Although there is no right to jury trial in admiralty courts, the Savings to Suitors Clause preserves the option in many cases to maintain an action in state or, if an independent ground of federal jurisdiction exists, in federal civil courts.

22 Admiralty jurisdiction benefits a claimant in that he has access to federal district court without a showing of diversity of citizenship or an amount in controversy of at least $10,000. He is not limited by venue restrictions but may bring his action in rem (against the vessel) or in personam (against the owner) in any district in which he can attach or garnish the credits and effects of the defendant or serve process on him.

23 1941 A.M.C. 483 (S.D.N.Y. 1941) (Action for wrongful death of passenger of seaplane that crashed into the Pacific Ocean).


25 See note 9 supra.


27 409 U.S. 249 (1972) aff'd on other grounds 448 F.2d 151 (6th Cir. 1971). This unanimous decision by the Supreme Court involved the crash, without loss of life, of a jet aircraft that had been chartered to fly from Cleveland, Ohio to
“strict locality” test alone will no longer be used to determine whether aviation tort claims will come under the admiralty jurisdiction of the federal courts:28

It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. . . . [U]nless such a relationship exists, claims arising from airpline accidents are not cognizable in admiralty in the absence of legislation to the contrary.29

Executive Jet is the Supreme Court’s most recent and comprehensive pronouncement concerning the issue of admiralty’s jurisdictional ambit over aviation tort claims arising from accidents on or over navigable waters, and represents an effort to limit the extension of admiralty jurisdiction over such torts.30 The Court narrowly focused its decision on domestic flights and held that “there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.”31 However, the Court expressly reserved the question of “whether an aviation tort can ever, under any circumstances, bear a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction. . . .”32 [emphasis added]. The thrust of the opinion in Executive Jet is that the Supreme Court has serious doubts that airplane torts.

White Plains, New York via Portland, Maine. The accident occurred shortly after take off from Burke Lakefront Airport in Cleveland when the jet struck a flock of sea gulls. The plane lost power when the gulls were ingested into the plane’s engines and as it descended it struck the airport perimeter fence, the top of a pick up truck, and settled into the waters of Lake Erie.

The owner sought admiralty jurisdiction in district court alleging negligence by defendants in clearing the aircraft for take off and in failing to warn of or remove the sea gulls from the runway. The court dismissed for lack of jurisdiction in admiralty because the tort occurred over land and the flight bore no relation to maritime commerce. The Court of Appeals affirmed agreeing that the tort occurred over land.

28 The Court in Executive Jet deemed application of the “strict locality” test inappropriate to aviation torts since the invocation of admiralty jurisdiction should be based on historical and logical justification rather than fortuity.

29 409 U.S. at 268.

30 Regarding DOSHA, however, the Court considered it as settled that 46 U.S.C. §§ 761 et seq. gave the federal courts jurisdiction over wrongful death actions arising out of airplane crashes into the high seas beyond one marine league but noted that most cases brought under the Act involved 1) a maritime locality, as well as 2) some relation to maritime commerce and navigation. 409 U.S. at 263.

31 Id. at 274.

32 Id. at 269-271.
can "ever" bear a significant relationship to "traditional maritime activity." The Court was quite explicit about what did not constitute such activity. Neither the plight of a survivor of a crash at sea, nor the fact that a plane goes down on navigable water, nor the occurrence of negligence "over" such waters "is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction."33

Besides indicating that the purpose of requiring a "significant relationship" is to screen out matters which were beyond the competence of admiralty, the court provides only two examples where admiralty jurisdiction might be properly invoked on the ground that the airplane was performing a function traditionally performed by waterborne vessels: transoceanic flights34 and the unusual case of pilots performing duties ordinarily performed by men in water vessels and actively engaged in the traditional marine business of fishing.35 Thus, the definition of what does constitute a "significant relationship to traditional maritime activity" in the context of air commerce has been left to the lower federal courts for a case-by-case analysis.

As if guided by malign intelligence, a number of aircraft crashes occurred in 1973 which fell within the area left open by Executive Jet, that is, maritime tort claims arising from flights outside the continental United States.

A significant maritime function was performed by a helicopter in Higginbotham v. Mobil Oil Corp.,36 while ferrying workmen to a man-made island (off-shore drilling platform) 100 miles off the coast of Louisiana. As a result of its crash, a damage claim was heard in admiralty based on the court's feeling that the helicopter had been performing the traditional function of a crewboat.

Teachy v. U.S.37 involved the helicopter air-sea rescue of a

33 Id. at 271.

34 Having cleared the air (water?) with regard to the "strict locality" test Justice Stewart began to muddy the waters with dicta:

It could be argued for instance, that if a plane flying from New York to London crashed in the mid-Atlantic, there would be admiralty jurisdiction over resulting tort claims even absent a specific statute. An aircraft in that situation might be thought to bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels. (Id. at 271).

35 Id. at n.22. Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970) (Mid-air collision of two light aircraft used in spotting schools of fish and the crash of those aircraft in the Gulf of Mexico).


sailor from a sinking shrimp boat in the Gulf of Mexico. The plaintiff argued that since sea rescue was a function traditionally performed by boats, *Executive Jet*’s two-pronged test had been met. The court avoided ruling on this contention and held that there was no maritime jurisdiction since the helicopter touched down, after the rescue, at a Coast Guard base in Key West and subsequently crashed on a trip to a base at St. Petersburg. Both bases were points within the continental United States.

In *Hark v. Antilles Airboats, Inc.*, a seaplane, bound for the island of St. Croix, crashed shortly after take off from the waters of the harbor of St. Thomas Island. The court found admiralty jurisdiction because the take off of a seaplane had a distinct maritime character and alternatively, because the flight, although not international, was to be conducted primarily outside the territorial jurisdiction of the Virgin Islands and over the high seas. The *Hark* court found justification for its alternative and broader holding in that the Supreme Court in *Executive Jet* had restricted its holding to intracontinental United States flights and had mentioned that admiralty jurisdiction over international air commerce might be justified out of convenience in order to “avoid choice-of-forum problems, choice-of-law problems, international law problems, problems involving multiple conventions and treaties, and so on.”

*Dicta* in *Executive Jet* suggesting that a transoceanic flight might be viewed as performing the traditional maritime function of a ship at sea was considered persuasive in *Roberts v. U.S.* where a Flying Tiger cargo plane crashed into the sea off the coast of Okinawa on a flight from Los Angeles to Vietnam. The Ninth Circuit felt that the international nature of the flight and the fact that transoceanic carriage of cargo could be considered a function traditionally performed by a freighter, sufficiently met the requirements of *Executive Jet* to invoke admiralty jurisdiction.

Recently, an aircraft crash in the Atlantic Ocean, which occurred on a flight from Atlantic City, New Jersey, to Block Island off the coast of New York, was held to fall outside the jurisdiction of admiralty in the case of *American Home Assurance Co. v.*
Plaintiff’s allegation that this was a weather related accident and that weather problems were a traditional bane of the seaman did not convince the court that “traditional maritime activity” existed since other vehicles face weather problems daily. As in Higginbotham, supra, the flight in question was from a point within the continental United States to an island accessible only by air or sea. This court took a different tack and held that the fact that Block Island was separated from the mainland was “[j]n-sufficient alone to distinguish this case from Executive Jet. ...”

Thus the mere act of crossing navigable waters from a point within the continent to an island, a service traditionally performed by a ship, did not impute a maritime function to an airplane.

The Honorable Judge Richey, writing the opinion in Hammill v. Olympic Airways S.A., also found the issues left open by the Supreme Court squarely before his court. In granting admiralty jurisdiction he considered language in Executive Jet (to the effect that a transoceanic flight might be viewed as performing the function of a ship at sea) helpful although not of itself dispositive. The reasoning in Hammill, similar to that in Hark, is that, although, the defendant’s jetliner was engaged in what could be considered a Greek domestic flight, the portion of the flight over the international waters of the Mediterranean Sea was similar in function to that of a coastal vessel involved in island-to-mainland transport.

The problem with the analysis in Hammill is that it interprets Executive Jet as permitting automatic admiralty jurisdiction where: 1) The point of departure or destination (or both) of an airplane is outside the continental United States, 2) A crash occurs in navigable waters and 3) A court can rationalize that the airplane was fulfilling the traditional maritime function of some suitably-named boat or ship. Thus every airplane that leaves or arrives at an island will be considered to be performing a maritime function simply because in the past only boats provided this service.

The mechanical application of the “locality plus traditional maritime function” test of Executive Jet by means of such geographical parameters of departure and destination flies directly in

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41 389 F.Supp. 657 (M.D. Pa. 1975) (The plaintiff, American Home Assurance, was acting as subrogee of Delaware Valley Aviation Inc.).

42 Id. at 658.

43 See note 34 supra.

44 Hammill at 833.

45 Higginbotham, note 36 supra, (crewboat); Hark, note 38 supra, (inter-island ferry); Roberts, note 40 supra, (ocean freighter).
the face of the Supreme Court’s language which emphasizes the difference between air and sea transport, not their similarities. Furthermore, such an interpretation is an unwarranted extension of the holding of that case, which, when carefully read, reveals that when the Court said, “there is no . . . admiralty jurisdiction over . . . flights . . . between points within the continental United States” [emphasis added] they did not say that there would be such jurisdiction over flights outside the continental United States. The overwhelming thrust of the opinion doubts that there could ever be such jurisdiction.

There are further difficulties with the Hammill court’s reliance on the Supreme Court’s hypothetical in *Executive Jet*. The district court completely ignored the fact that Justice Stewart acknowledged Professor Moore’s argument that there could be no rational basis for allowing admiralty jurisdiction over claims arising from a crash into transoceanic waters. According to Moore, a person injured in such a crash would have a maritime tort action if the plane went down before reaching shore, but a nonmaritime claim if the plane managed to remain airborne until reaching shore. This result would obtain even though the cause of the crash in both instances may have been the development of engine trouble or pilot error that occurred at an identical site far out over the ocean. Moore maintains that such an irrational distinction and forced application of an inappropriate body of maritime law to aviation torts cannot be justified by the difficult international law problems inherent in such a flight.

Traditionally, admiralty has not been a “port of convenience” nor have its courts been “harbors of avoidance.” The substantive law of admiralty has evolved over the centuries, before the advent of the air age, to handle the problems of vessels which ply the waterways of the world. Maritime law deals with navigational rules which admiralty courts look to in order to determine fault. These courts, through long experience, know how to determine if a “vessel” is “seaworthy” and when the relief provi-

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46 See note 44 *supra*.

47 409 U.S. at 271 & n.21.

48 7 A. J. Moore, 330[5], at 3772.

49 Id. at 3772-75.


51 For purposes of maritime law an airplane is not a “vessel.” See *e.g.*, The Crawford Bros. No.2, 215 F. 269 (W.D.Wash. 1914); Reinhardt, note 21 *supra*. 
sions of “maintenance and cure” are due seamen. Yet, the fault which results in an airlplane’s unexpected descent will invariably be attributable to a cause unrelated to the sea, whether it be pilot error, weather, defective design or manufacture of airframe or engine, air traffic controller error, or mid-air collision. Therefore, the determination of causation and liability will be based on factual and conceptual inquiries unfamiliar to admiralty.

For example, in Hammill, the crash occurred while the plane was approaching the Athens airport in foul weather. The pilot was not following maritime navigational procedures, but was navigating off a land beacon or under the radar control of the Athens airport. Certainly he was flying IFR (under Instrument Flight Rules) and the expertise of admiralty law would be of no help in deciphering these rules to determine the cause of the crash. Despite these inconsistencies, the Hammill court considered admiralty jurisdiction “uniquely appropriate” and noted that admiralty’s uniformity recommended its use to avoid various international conflicts, and choice-of-law problems confronting the court.

Once the court in Hammill found admiralty jurisdiction, it then proceeded to assess whether the plaintiff sufficiently pleaded a maritime cause of action. Recovery for wrongful death in admiralty was theorized under both DOSHA and general maritime law. The court found that the plaintiff presented a cause of action for wrongful death under the general principles of maritime law sufficient to survive a motion to dismiss. This court considered it unnecessary to address the possibility of recovery under DOSHA in light of the new, more expansive common law maritime remedy made available by the Supreme Court in Moragne v. States Marine Lines, Inc. and extended in Sea-Land Services Inc. v. Gaudet.

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52 Crews of airplanes (airmen) have been deemed not to be “seamen” for the purposes of admiralty. Accord, King v. Pan-American World Airways, 270 F.2d 355 (9th Cir. 1959); Chance v. United States, 266 F.2d 874 (5th Cir. 1959).

53 See 409 U.S. at 270.

54 Hammill at 834.

55 398 U.S. 375(1970). Moragne involved the death of a longshoreman who had been working on a vessel within Florida’s territorial waters. The decedent’s widow sued in state court under Florida’s Wrongful Death Statute alleging negligence and unseaworthiness. Defendant’s removal to federal district court resulted in the dismissal of the unseaworthiness count. Eventually the issue reached the Supreme Court on certiorari where Justice Harlan wrote a comprehensive opinion creating a common law remedy for wrongful death under the principles of general maritime law.

56 414 U.S. 573 (1974). Gaudet, a longshoreman, was seriously injured while working on a Sea-Land vessel in Louisiana territorial waters. The district
Prior to the Court's unanimous decision in *Moragne*, there was no common law action for maritime wrongful death in the absence of a statute. Although Justice Harlan's language in *Moragne* seems to make the new maritime action available only where no federal statutory remedy exists, the Supreme Court spoke again on the matter in *Gaudet*, and emphasized that federal statutes do not enjoy such primacy. According to Professor Gilmore, *Gaudet* has reduced DOSHA's wrongful death provisions to the level of a "nonstatutory Restatement."

As justification for its failure to decide on the applicability of DOSHA, the court noted that the practical consequences for the parties would be the same either way the court ruled, since, in accordance with Justice Harlan's mandate in *Moragne*, the lower federal courts could fashion an appropriate measure of damages and not be bound by the provisions of DOSHA. With borrowed language from *Gaudet*, the Hammill court advised that if plaintiff proved his case a remedy would be fashioned which would extend admiralty's "special solicitude for those men who undertake to venture upon hazardous and unpredictable sea voyages" and would "be guided by the principle of maritime law that it better becomes the humane and liberal character of proceedings in admiralty to give than withhold a remedy. . . ."

Had the court spoken on the applicability of DOSHA, it would have been faced with the defendant's contention that Section 764, not Section 761 of the Act, applied to this incident. If this were found to be true, plaintiff would have had to plead court granted recovery to his estate for personal injuries in a suit based on unseaworthiness. (He died while the recovery was being appealed). Thereafter Mrs. Gaudet brought a wrongful death action under *Moragne* to recover for her own loss as a result of her husband's death. The district court denied recovery, the circuit court reversed, and the Supreme Court, on certiorari, upheld the circuit court's reversal and allowed the widow to recover damages for loss of support, services, society, and funeral expenses.

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57 *Moragne* explicitly overruled The Harrisburg, 119 U.S.199 (1866), which had denied recovery for wrongful death under maritime law.

58 398 U.S. at 402.

59 414 U.S. at 583, 588 & n.22.


The maritime death remedy as explicated in *Gaudet*, is now more comprehensive and provides for a greater recovery than had previously been available under the federal death statutes or most state death statutes.

See G. Gilmore § 6-33 at 374, for an interesting discussion of the trend towards de-codification. [hereinafter cited as G. Gilmore].

61 398 U.S. at 408; see also G. Gilmore, *supra* note 60, at 368.

62 Hammill at 837.
and prove Greek law in this federal admiralty court, to recover under DOSHA.63

The maritime claim in Hammill was not exclusively cognizable in admiralty. In Moragne, Justice Harlan suggested that actions for wrongful death on the high seas could be brought under the Savings to Suitors Clause64 in nonadmiralty courts with a right to jury trial.65 However, this court failed to address the viability of this theory of recovery and considered it irrelevant66 since the amended complaint of the plaintiff did not reflect a request for jury trial. This is one of the main advantages of a suit brought on the "civil side" of a federal district court. In any case, absent a declaration in the plaintiff's complaint identifying the claim as an admiralty claim67 "and if an independent nonadmiralty ground of

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63 In response to plaintiff's claim of recovery under DOSHA, 46 U.S.C. §§ 761 et seq., defendant contended that the claim was exclusively governed by § 764 which provides in pertinent part:

Whenever a right of action is granted by the law of any foreign state on account of death by wrongful act, neglect, or default occurring on the high seas such right may be maintained in an appropriate action in admiralty in the courts of the U.S. . . .

There is authority to support this contention, where an American citizen has been killed on a foreign carrier that crashes into the high seas (such as the death in Hammill) and the applicable foreign law provides a recovery for wrongful death as defendants maintained it did. See Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V., 188 F. Supp. 594, 597, (S.D. N.Y. 1960); Noel v. L.A.V., note 70 supra; the Vestris, 53 F.2d 847 (S.D. N.Y. 1931); I. Kreindler, 1 Aviation Accident Law § 2.10 (2) (b) (i) (Rev. ed. 1974); Comment, 51 Cal. L. Rev., 389, 395, (1963).

The fact that the crash occurred inside the Greek territorial limit does not seem to render § 764 of DOSHA inapplicable since the "within one marine league" restriction was probably intended by Congress to apply to American territorial restrictions only. See Roberts v. U.S., supra note 40, at 524 & n.7; 51 Cal. L. Rev., at 397. Defendant noted that plaintiff should have pleaded Greek law when bringing an action under the laws of that foreign carrier's nation. The following cases, dealing with foreign air carriers crashing into the high seas and resulting in wrongful death actions brought under DOSHA, applied those countries' laws and support defendant's contention: Fernandez v. L.A.V., 156 F. Supp. 94 (S.D.N.Y. 1957), (Libel based on § 764 dismissed because Venezuelan law insufficiently pleaded); Iafrate v. Compagnia Generale Transatlantique, 106 F. Supp. 619 (S.D. N.Y. 1952), (Claim based on French wrongful death law dismissed because insufficiently pleaded).

64 See note 8 supra.
65 See note 22 supra.
66 Hammill, supra, at 836-837.
67 A federal district court may, in its admiralty posture, hear claims under 28 U.S.C. § 1333 or the admiralty suit may, through the Savings to Suitors Clause of § 1333, be considered under 28 U.S.C. § 1332 by the same judge on the same docket under what used to be called the "civil side" of the federal court; as-
jurisdiction appears, the action will go forward under general civil procedure, not subject to the special provisions made for cases in which the admiralty jurisdiction is invoked. Since the first theory of recovery in plaintiff's complaint did plead the requisite diversity and jurisdictional amount to provide a nonadmiralty ground of jurisdiction and because plaintiff failed to invoke the distinctively maritime procedures referred to in Rule 9(h) of the Federal Rules of Civil Procedure, this action could probably have been decided on the "civil side" of the court even without the special advantage of a jury trial.

Since the plaintiff, a Virginia resident, brought suit against the defendant foreign air carrier which was doing business in Washington, D.C., a determination of jurisdiction under 28 U.S.C. §1332 would require a choice-of-law analysis under the Washington D.C. Choice-of-Law Doctrine. The memoranda of the parties reflect an agreement that under this doctrine the federal courts of the District of Columbia would apply the law of the jurisdiction with "the most substantial or significant interest." The type of "contacts" to be taken into account in making this determination are:

summing, of course, that the requisite diversity of citizenship and jurisdictional amount have been pleaded. Where two such possibilities exist, to establish jurisdiction, the claimant may elect admiralty. See, FED. R. CIV. P. 9 (h) which provides in pertinent part:

A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim . . .

An allegation that a claim is within admiralty jurisdiction without a statement that identifies the pleadings as an admiralty claim has been held insufficient for the purposes of Rule 9(h), to invoke the special admiralty procedures and remedies. Banks v. Hanover S.S. Corp., 43 F.R.D. 374, 376-77 (D.C. Md. 1967); 5 WRIGHT & MILLER, MODERN FEDERAL PLEADING AND PRACTICE § 1313 & n.35 (1969).

The advisory committee note to Rule 9, as amended, explains that in order to invoke the distinctively maritime procedures referred to in Rule 9(h) the magic words, "This is an admiralty or maritime claim within the meaning of Rule 9(h)" or their equivalent must be found within the complaint. See 28 U.S.C.A. FED. R. CIV. P. Appendix of Forms, form 2(d).

Plaintiff in his amended complaint failed to do this. Paragraph 20 of that complaint merely reads, "Jurisdiction is founded upon 18 [sic] United States Code, §1333 and 46 United States Code, §§ 761 et seq."

68 G. GILMORE, supra note 60, at §§ 1-9.
69 See note 67 supra.
(a) The place where the injury occurred,
(b) The place where the conduct causing the injury occurred,
(c) The domicile, residence, nationality, place of incorporation and business of the parties, and
(d) The place where the relationship if any, between the parties is centered.71

The plaintiff's decedent bought her ticket in Corfu, flew on a one-way, non-stop, Greek domestic flight and was killed in a crash in Greek waters as a result of an unknown cause which could only have originated and had its impact within Greece. It is likely that Greece would have "the most significant interest" thus necessitating that the plaintiff plead and prove Greek law.72

Not only was the Hammill court's use of admiralty jurisdiction useful to avoid the choice-of-law problems of DOSHA and the conflict-of-law problems inherent in a diversity action under Title 28 U.S.C. §1332 on the "civil side," but admiralty jurisdiction conveniently allowed the court to sidestep the complicated international law problem posed by plaintiff's theory of recovery under the Warsaw Convention. Had the court ruled on the theory of recovery under the Montreal Agreement,73 amending the Warsaw Convention, the plaintiff's opportunity to enjoy an American forum would have been endangered. Olympic Airways S.A. is a signatory of the Convention.74 Greek law has adopted and would apply the Convention to airplane accidents arising from Greek domestic flights.75 Article 28(1) of the Warsaw Convention has been re-

71 1 Restatement (Second) of Conflicts of Laws §§ 6 & 145 (1971).
72 See e.g., Tramontana v. S.A. Empresade Visceo Aerea Rio Grandense, 350 F.2d. 468 (D.C. cir. 1965), cert. den., 383 U.S. 943 (1966), which held that Brazil had contacts superior to those of the District of Columbia in an airplane crash, similar to the one at bar, and applied Brazilian law.

When applying the law of the foreign carrier's nation defendant urged that plaintiff should have pleaded Greek Law. The following cases, dealing with foreign air carrier crashes into the high seas and resulting in wrongful death actions brought under DOSHA, applied that country's laws and support defendant's contention: Fernandez v. L.A.V., 156 F.Supp. 94 (S.D.N.Y.1957) (Libel based on § 764 dismissed because Venezuelan law insufficiently pleaded); Iafrate v. Compagne Generale Translantique, 106 F. Supp. 619 (S.D.N.Y. 1952) (Claim based on French Wrongful death law dismissed because insufficiently pleaded.).

73 See note 5 supra.
74 L. Kreindler, 1 Aviation Accident Law, at § 12A.03.
75 Hammill at 831. Adherence to the Warsaw Convention by this signatory nation for crashes emanating from its domestic flights is an extension of art.1 of the Warsaw Convention which limits applicability to "international transportation" only.
peatedly invoked to prevent suit in a court which does not sit in the territory of a "high contracting party." In this case the United States was not one of the four places described in Article 28(1) and therefore was not a "high contracting party." Assuming that Article passed Constitutional muster, plaintiff could have been foreclosed from bringing an action in this country.

As such, it would have been necessary to plead in Greek courts which would apply the Hague Protocol and limit recovery to approximately $18,000. On the other hand, if the court had construed the venue provisions of Article 28(1) so as to allow an action under the Convention in the United States, the basic liability limitations of the Convention would have also been binding.

Even assuming that the Warsaw Convention might not be self-executing, there is support for the proposition that:

Regardless of whether actions involving aircraft of flights within the scope of the Warsaw Convention are based on the Death on the High Seas Act, the general maritime law, a state statute, or the common law the limitation provisions of the convention are [still] held to apply. [emphasis added].

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76 Article 28(1) of the Convention provides:
An action for damages must be brought, at the option of the plaintiff in the territory of one of the high contracting parties, either before the court of the domicile of the carrier or of his principal place of business, or where he had a place of business, through which the contract has been made, or before the court at the place of destination.

77 The constitutionality of art. 28(1) of the Convention has been vehemently disputed; See Burdell v. Canadian Pacific Airlines Ltd., 1968 U.S.Av.R. 1133, 1145 Vol. III, 10 AVI. 18, 151 (State of Ill. Cir. Ct., Cook County 1968); 6 ALR3d 1272 (1966); Donald Haskell, The Warsaw System and the U.S. Constitution Revisited, 39 J. OF AIR L. AND COMM. 483, 490 (1973); J. Kennelly, Aviation Law: International Air Travel — A Brief Diagnosis and Prognosis, 56 CHIC. BAR Rec. No.4, 178, 189-90 (Jan.-Feb. 1975).

78 C.A.B. Order No. E23680, at 2; J. Kennelly, supra note 77, at 182.

79 Block v. Compagnie National Air France, 229 F.Supp. 801 (N.D. Ga. 1964), aff'd 386 F. 2d 323 (5th Cir. 1967). The legal effect given to an international treaty by the United States Constitution elevates the Warsaw Convention to the level of an Act of Congress; i.e. "the supreme law of the land." U.S. CONST. art VI, cl.2; see D. Haskell, supra note 77, at 493.


81 See e.g., Eck v. United Arab Airlines, Inc. 15 N.Y.2d 53, 203 N.E.2d 640 255 NYS 2d 249 (1964); Noel v. L.A.V., 72 note supra; 66 ALR2d 897 (1959); J. Moore and Pelaz, supra note 70, at 29-30.

82 J. Moore and Pelaz, supra note 81, at 29-30.
Since there are many ways in which the Warsaw Convention could have limited the liability of the defendant, the court should have been stimulated to pass on the applicability of that treaty. The Hammill court failed to point out any restrictions on damages. Quite the contrary, although not required to address the issue of damages at this point, the court implied that it had almost unbridled discretion in fashioning a remedy and advised that such a remedy would be a liberal one, "not bound by . . . the nature and scope of the remedies afforded by existing relevant federal and state statutes."\textsuperscript{83} It is suggested that such \textit{dicta}\textsuperscript{84} could have misled the defendant into believing he would be liable for damages in excess of Warsaw Convention limits and that this could have substantially prejudiced the defendant in settlement negotiations.

The Hammill court said that the possibility that the Saving Clause afforded plaintiff a common-law cause of action for wrongful death was a "consideration worthy of mention."\textsuperscript{85} The court neglected to, but should have mentioned the parallel theories of recovery under DOSHA and the Warsaw Convention in the interests of judicial economy. If, on appeal, this court had been reversed for a finding of maritime jurisdiction based on its interpretation of \textit{Executive Jet}, its failure to pass on these issues would have necessitated a rehearing at the district court level. Such a determination, although not mandatory, would have also served both the interests of expediency and justice. Clarification on these points would have assisted both parties in preparing for discovery and trial, or as it turned out, in negotiating a settlement.\textsuperscript{86}

Faced with such a complex array of international, choice-of-law and choice-of-forum problems, it is not surprising that the Hammill court sought refuge in the harbor of admiralty. The Supreme Court allowed such shelter by restricting the denial of admiralty jurisdiction to intracontinental flights. The other theories of jurisdiction could have deprived the plaintiff of an American forum for his action and set him adrift on the unpredictable waters of Greek law. To have abandoned the plaintiff in such a manner would have been to ignore the general tendency (albeit visceral and paternalistic in origin) of admiralty courts to apply American law in any personal injury or death case where the action is

\textsuperscript{83} Hammill at 837.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} Hammill at 836.
\textsuperscript{86} The case never went to trial but was settled for an undisclosed amount.
brought by a citizen of the United States, regardless of the fact that the injury occurred in a foreign flag vessel in foreign waters.\textsuperscript{87}

Admiralty law developed in this country to deal with the vagaries and legal problems of the shipping industry. At first, it was believed that the law of admiralty could adapt to the legal problems of the air age. In a quixotic attempt to provide an American forum and uniform body of law for claims resulting from injuries and death outside the United States, admiralty courts such as this one have strained to find fictional similarities between ships and aircraft, somewhat akin to their historical endeavor to personify the ship. But, as the Supreme Court noted in \textit{Executive Jet},\textsuperscript{88} the multidimensional nature of flying and resultant problems have rapidly outstripped the expertise of admiralty. This is especially true now that air travel may exceed the speed of sound by many times and is rapidly approaching the point where it will no longer be bound by the earth's gravitational pull. These factors call for the development of a specialized uniform body of aviation law.

The Warsaw Convention was enacted to provide uniformity in the treatment of claims arising from "international" air travel.\textsuperscript{89} Yet, much criticism has centered on the plight of an international traveller, such as Ms. Caroline Hammill Cagle, who happens to take a side-trip and, while off her planned itinerary, purchases a ticket from a foreign carrier in a foreign country, with an ultimate destination someplace other than the United States. Such a passenger does not have a right to sue in the United States for her injuries even though the carrier may have had a secondary place of business in this country. The Guatemala Protocol\textsuperscript{90} will correct some of these inequities and become the comprehensive new law of international airline liability if ratified by the United States. Until it is so ratified, the Convention has not accomplished its objective.

To provide uniformity in domestic air travel, the Supreme Court, in \textit{Executive Jet}, suggested that Congress provide uniform federal treatment for aviation tort claims, wherever they occur, by

\textsuperscript{87} G. Gilmore at 473-74.
\textsuperscript{88} 409 U.S. at 268-70.
\textsuperscript{89} A. Lowenfeld, \textit{Aviation Law} \S 2.1, VI-26 (1972).
\textsuperscript{90} Article XII of the Guatemala Protocol will expand art. 28(1) of the Warsaw Convention by allowing an action to be brought in the country of a passenger's domicile or permanent residence, provided the airline has "an establishment" there. See, L. Kreindler \S 12B.03[8]. Thus the Hammill plaintiff would have probably been able to sue Olympic Airways S.A. if the Guatemala Protocol would have been in effect.
means of the Commerce Clause.\textsuperscript{91} Indeed, Senator Tydings (D-Md.) introduced legislation for a comprehensive body of federal law governing civil legal relations and acts arising out of aviation activity.\textsuperscript{92} Unfortunately, the bill stalled in committee when the impetus provided by Senator Tydings ended with his failure to be re-elected.

Recently, several federal courts have suggested that there should be a federal common law of aviation.\textsuperscript{93} This result cannot be obtained without the abrogation, by the Supreme Court, of the \textit{Erie} doctrine as it is applied to aviation diversity cases today.\textsuperscript{94} \textit{Kohr v. Allegheny Airlines, Inc.}\textsuperscript{95} represents a major step in this direction. The Seventh Circuit held, in this diversity case, that instead of applying Indiana law on the issue of contribution and indemnification, a prevailing federal interest in uniform air regulation called for a federal law of contribution and indemnification to govern mid-air collisions with resultant choice-of-law problems.

\textsuperscript{91} Such a federal statute could allow state and federal courts jurisdiction over aviation negligence claims just as they do over federal question cases, with admiralty having jurisdiction over none of them. See \textit{e.g.}, Sweeney, \textit{Is Special Aviation Liability Legislation Essential}, 19 J. AIR L. AND COMM. 166, 317 (1952).


\textsuperscript{93} See \textit{e.g.}, Humphrey v. Lann 487 F.2d (6th Cir. 1973); Gabel v. Hughes Air Corp 350 F.Supp. 757 (S.D. Ohio 1972) See also Keefe and Devalerio Dallas, \textit{Dred Scott and Erie Erie}, 38 J.AIR. L. AND COM. 107 (1972).


\textsuperscript{95} 504 F. 2d 400 (7th Cir. 1974), \textit{Cert. den.} 421 U.S. 978 (1975). This case arose from a mid-air collision between an Allegheny Airliner and a private aircraft over Indiana. A wrongful death diversity action ensued followed by cross-claims, third party claims, and answers which raised the issue of contribution and indemnification. The district court ruled that Indiana law applied and that there was no right to contribution and indemnification. The Seventh Circuit reversed and held that federal law would govern and allow contribution and indemnity on a comparative negligence basis.
If the Hammill court had allowed jurisdiction under 28 U.S.C. §1332 to be triggered by the Savings to Suitors Clause a similar approach could have provided uniform treatment for the defendant who was doing business in Washington, D.C. and the Virginia plaintiff. Instead, the court applied admiralty law to an airplane crash merely because of the fortuity that the departure point was an island and the plane happened to “come down” on navigable waters — a patchwork solution to a large-scale problem.

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* See note 70 supra.