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Admiralty Tort Jurisdiction—Traditional Maritime Activity Explained: Commercial Use of Vessel Unnecessary to Invoke Jurisdiction

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ADMIRALTY TORT JURISDICTION—TRADITIONAL MARITIME ACTIVITY EXPLAINED: COMMERCIAL USE OF VESSEL UNNECESSARY TO INVOKE JURISDICTION. *Foremost Insurance Co. v. Richardson*, 102 S. Ct. 2654 (1982).

Clyde Richardson was killed in a collision between two pleasure boats on the Amite River in Louisiana. The decedent's wife and children brought suit in the United States District Court for the Middle District of Louisiana against the petitioners, Shirley Eliser and Foremost Insurance Company, Ms. Eliser's insurer, alleging negligent operation of the boat which collided with the decedent's boat. Jurisdiction was claimed under chapter twenty-eight of the United States Code at section 1333(1).[1] The petitioners moved to dismiss the suit on the grounds that it did not state a claim within the court's admiralty jurisdiction. The district court, citing *Executive Jet Aviation, Inc. v. City of Cleveland*[2] as controlling, found that since both boats were used exclusively for pleasure and had never been used in commercial maritime activity, they were not, at the time of the accident, engaged in "traditional maritime activity," and the complaint was dismissed.[3]

The Fifth Circuit Court of Appeals reversed.[4] While agreeing with the district court that something more than a tort occurring on navigable waters was needed to sustain admiralty jurisdiction, the court of appeals found that jurisdiction was present in the instant case. The court of appeals thought that a jurisdictional test which depended on a judicial determination of whether a vessel was engaged in a commercial activity would create uncertainty for vessel owners about whether they were subject to state jurisdiction or federal jurisdiction. Additionally, the court reasoned that non-commercial navigators traveling on waters that are shared by more than one state would find themselves subject to different obligations and

1. 28 U.S.C. § 1333(1) (1976) provides in pertinent part: "The district courts shall have original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

2. 409 U.S. 249 (1972). This case held that claims must bear a significant relationship to traditional maritime activity to be cognizable in admiralty. *See infra* notes 56-58 and accompanying text.

3. Richardson v. Foremost Ins. Co., 470 F. Supp. 699 (M.D. La. 1979).

4. Richardson v. Foremost Ins. Co., 641 F.2d 314 (5th Cir. 1981).

duties depending on their precise location.[5] As a result of these policy considerations the court held that "two boats, regardless of their intended use, purpose, size and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters."[6]

The United States Supreme Court granted certiorari to resolve the confusion in the lower courts in determining federal admiralty jurisdiction and affirmed the decision of the Fifth Circuit Court of Appeals. *Foremost Insurance Co. v. Richardson*, 102 S. Ct. 2654 (1982).

The opinion of the district court[7] that the term "traditional maritime activity" should refer only to commercial maritime activity can be traced to the origins of maritime law. The roots of maritime law go back over 5000 years to the beginning of commerce in the Mediterranean Sea.[8] Water carriage was the chief means of transporting people and goods, and there is evidence that some form of procedure existed to settle any "legal problems" that arose among those early mariners.[9] While no formal code of sea laws has survived from these early times,[10] the customs employed in port tribunals throughout history have done much to shape maritime law of the present.[11]

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5. *Id.* at 316.

6. *Id.*

7. Richardson v. Foremost Ins. Co., 470 F. Supp. 699, 701 (M.D. La. 1979).

8. 1 E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY, § 2 (7th ed. 1981).

9. G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY § 1-2, at 3 (2d ed. 1975).

10. "Of the functionally or formally 'legal' dispositions that arose . . . in ancient times we know very little. Nothing like a formal sea-code has survived even from Greek or Roman antiquity . . . ." *Id.*

11. G. GILMORE & C. BLACK, JR., *supra* note 9, uses the example of the distinctive maritime law system of general average in which if something is sacrificed to save the ship from peril, contributions from the property not sacrificed are used to make good the loss to the owner of the sacrificed property. "Glimpses such as this remind us that . . . maritime law is very old, and . . . both commercial shipping and its law . . . began in the Mediterranean." *Id.* at 4.

This early maritime law grew out of a need to regulate disputes arising between those involved in commerce. The decisions of these tribunals were codified into maritime law. One of the earliest codes of which there is any evidence is the Rhodian Law, referred to in the Roman digests. Nothing, however, is known of the substantive law of this code. After the fall of the Roman Empire, political chaos reigned in Europe. Since commerce on the seas continued throughout this time, the only relatively stable legal system was maritime law. Port tribunals during the Middle Ages went through the same type of evolutionary processes as had occurred previously, particularly after the rise of the Italian ports. After 1000 A.D., the right of autonomous admiralty courts to regulate shipping disputes grew out of the law merchant, the granting of power to local tradesmen to settle their own differences free from local jurisdiction. Much of the law merchant has shaped the development of pres-

As commerce increased, the business of port tribunals also increased, accompanied by the need for a written code of laws and customs of the port.[12] One of the most important of these written codes, from the standpoint of American admiralty scholars, was known as the Rules of Oleron[13] and is credited with bringing the sea customs of the Mediterranean to England. Because these Rules were probably adapted from Roman and French law,[14] England's maritime law was from its inception firmly imprinted with civil law practices, vestiges of which can still be seen today.[15]

English maritime law differed in one important respect from its counterparts in other European countries in that jurisdiction of civil cases of a maritime nature was given to the court of the Lord High Admiral.[16] The exact date for this occurrence is not known, but by the reign of Richard II (1377-1400) it was conducting enough business to make it the subject of several controlling statutes passed by Parliament.[17] One of these statutes, which limited jurisdiction to "a thing done upon the sea,"[18] was the authority behind the later jurisdictional conflict between the courts of common law and the admiralty courts.[19] As the power of admiralty grew, many of the cases which had been heard in the local common law courts in port towns were being heard in the admiralty courts.[20] This, along with a distrust on the part of the common law courts for the non-jury trials of admiralty, led to a practice by the common law judges of issuing

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ent maritime law. *Id.* at § 1-3; 1 E. BENEDICT, *supra* note 8, § 3; Benedict, *The Historical Position of the Rhodian Law*, 18 YALE L.J. 223 (1909).

12. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-3.

13. The expression "Rules of Oleron" is actually a generic term designating a number of similar collections of sea laws known by this name. Traditionally, it has been thought that Eleanor of Aquitaine wrote the Rules after a trip through the Middle East, where she supposedly studied the old maritime laws. She then rewrote them on an island off the southwest coast of France, the Ile d'Oleron. The laws were then taken to England by her son, Richard I (the Lionhearted) (1189-1199). G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-3, at 7-8; 1 E. BENEDICT, *supra* note 8, § 26.

14. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-3.

15. For example, maritime trials in the United States are still, for the most part, tried to a judge rather than to a jury. In addition, English admiralty practice today is in a court known as "Probate, Divorce, and Admiralty" (in the vernacular, "Wills, Wives, and Wrecks"), an odd combination arising from the Civil Law origins of the three subjects. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-4, at 10.

16. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-4. It is from this office that the term "admiralty" was derived.

17. *Id.* § 1-4, at 9.

18. *Id.* (quoting from 13 Rich. 2, ch. 5 (1389)).

19. *Id.*

20. *Id.*

writs of prohibition against proceedings in admiralty.[21] By the end of the seventeenth century, admiralty jurisdiction in England had been so severely restricted that it was much less extensive than that exercised in other countries. The common law courts, with the aid of Parliament, had succeeded in limiting the jurisdiction of admiralty to the high seas.[22] Excluded from jurisdiction were, among other things, transactions arising on waters within the body of the country and any contracts concerning shipping that were not actually made on the high seas.[23]

With the voyages of the explorers of the fifteenth and sixteenth centuries, shipping patterns changed. European maritime law was transplanted to the New World ports as the ports grew in importance to their respective mother countries.[24] In the British colonies, this transplantation took the form of colonial courts of the Vice-Admiralty.[25] Because of the Crown's desire to exercise firm control over the colonists, the admiralty courts there were not as restricted as they were in England.[26] The Crown recognized the value of a court of this nature, sitting without a jury, as a means of maintaining power and exempted these courts from the writs of prohibition.[27] Because of this experience with broad maritime jurisdiction, the drafters of the United States Constitution did not adopt the narrower English view of the law.[28]

The United States Constitution empowers the federal courts to administer maritime law.[29] The Judiciary Act of 1789 implemented

21. Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 23-24 (1871). This landmark case held that recovery of indemnity on marine insurance policies was cognizable in admiralty. The Court, in attempting to define the scope of American admiralty jurisdiction, discussed in great detail the limits imposed on English admiralty. The Court concluded that United States admiralty jurisdiction was not limited by the statutes or judicial prohibitions of England. *See also* G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-4, at 9-10.

22. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-4. The statutes of 13 Rich. 2, ch. 5 (1389) and 15 Rich. 2, ch. 3 (1391) strictly limited admiralty jurisdiction to occurrences actually arising on the high seas. A later statute imposed a penalty upon those who sued in the Admiral's Court contrary to the statutes of Richard II, 2 Hen. 4, ch. 11 (1400).

23. Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 24 (1871).

24. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-4.

25. *Id.*; Setaro, *The Formative Era of American Admiralty Law*, 5 N.Y.L.F. 9 (1959).

26. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-4.

27. De Lovio v. Boit, 7 F. Cas. 418, 442 (C.C.D. Mass. 1815) (No. 3776). This opinion, written by Justice Story on circuit, held that the early restrictions on the English courts of admiralty were not applicable to the colonies and therefore, their restrictions should not be imposed upon the admiralty courts of the United States.

28. Waring v. Clarke, 46 U.S. (5 How.) 441, 454-58 (1847) (accepting a broader scope of admiralty jurisdiction than had been in effect in England).

29. U.S. Const. art. III, § 2, cl. 1, provides in pertinent part: "the judicial power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

this constitutional grant of power.[30] These grants of power were the bases of the broad control exercised by the federal government in maritime matters, not only in the jurisdiction of the courts, but also in the area of substantive law.[31]

Neither the constitutional grant nor its implementing statute defined the jurisdiction of admiralty. Rather, they presupposed knowledge of what the terms "admiralty" and "maritime" meant and left it to judicial interpretation to establish more concrete jurisdictional limits.[32] Maritime law which was in force at the time of the adoption of the Constitution was accepted as law, subject to the power of Congress to alter, qualify, or supplement it as experience might dictate.[33] Substantive maritime law is, for the most part, controlled by Congress. State legislatures can act on maritime matters only when the subject does not conflict with general maritime law or federal statutes.[34]

One area in which both the state and federal courts exercise concurrent jurisdiction is that of maritime torts.[35] Traditionally, the determination of whether a tort is maritime and thus within the jurisdiction of admiralty depended upon the locality of the wrong.[36] This locality test was best defined in *The Plymouth*[37] in which the Court said:

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30. The Act is codified at 28 U.S.C. § 1333 (1976). *See supra* note 1 for text of statute.

31. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-9, at 20.

32. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934). Admiralty, rather than state courts, has the jurisdiction to foreclose a ship mortgage that is within the Ship Mortgage Act of 1920, 46 U.S.C. §§ 911-984 (1976).

33. *Detroit Trust Co.*, 293 U.S. at 43. *See also* Panama R.R. v. Johnson, 264 U.S. 375 (1924). (the Jones Act, giving injured seamen the right to trial by jury, upheld as constitutional).

34. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). State workmen's compensation laws for longshoremen held unconstitutional since they invaded the federally reserved area of maritime law. This case is said to have established the "Jensen Line" marking the boundary between landside and admiralty jurisdiction, *i.e.*, the water line.

35. *See supra* note 29 and accompanying text. The Judiciary Act of 1789 reserved to suitors in all cases any common law remedies where courts of common law were competent to give them. Suitors with tort claims may also bring suit, at their option, in an ordinary civil action in the common law courts (*i.e.*, a state court) or in federal court without reference to "admiralty" if they meet the other tests for federal jurisdiction. G. GILMORE & C. BLACK, JR., *supra* note 9, § 1-13 at 37.

36. Thomas v. Lane, 23 F. Cas. 957 (C.C.D. Me. 1813) (No. 13,902), another decision written by Justice Story on circuit, established the locality test for admiralty tort jurisdiction. *See also* The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825) (jurisdiction limited to the waters within the ebb and flow of the tide).

37. 70 U.S. (3 Wall.) 20 (1866). Due to the negligence of the ship's crew, a spark from the ship ignited the wharf to which it was moored. Jurisdiction was denied since the act took place on the wharf—on land rather than on water.

> [T]he 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 jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed upon board the vessel, but upon its having been committed on the high seas or other navigable waters.[38]

Originally, the application of the locality test was limited only to waters within the ebb and flow of the tide.[39] In 1845, Congress extended admiralty jurisdiction by statute to include the Great Lakes, which are non-tidal, and navigable waters connecting the lakes.[40] In 1851, the Supreme Court upheld the constitutionality of this statute and, in the same opinion, held that jurisdiction of admiralty also extended to all navigable waters throughout the nation.[41] With this case the application of the locality test had been expanded from the waters within the tidal flow to all navigable waters, including lakes and rivers. Waters are considered to be navigable when they are, in their ordinary condition, used or susceptible to use as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water.[42]

The locality test as strictly applied, created, as well as solved, problems for the courts. As the Court in *Executive Jet Aviation v. City of Cleveland*[43] said, "[t]he locality test . . . was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel."[44] However, the growth of the aviation industry and the increased use of navigable waters for recreation have frequently caused problems to occur.[45] A strict application of the locality test at times also caused problems in the area of commercial

38. *Id.* at 35.

39. The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825); *see supra* note 30.

40. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, 726-27 (current version, as amended, at 28 U.S.C. § 1873 (1976)) provides: "[T]he district courts of the United States shall have, possess, and exercise, the same jurisdiction . . . upon the lakes and navigable waters connecting said lakes as is now possessed and exercised by the said courts . . . upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States."

41. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) (overruling all previous cases giving jurisdiction a tidal limit).

42. *See* The Robert W. Parsons, 191 U.S. 17 (1903) (jurisdiction upheld on the Erie Canal, even though the vessel was a horse-drawn barge engaged in intrastate commerce).

43. 409 U.S. 249 (1972).

44. *Id.* at 254.

45. *See infra* notes 46-49 and accompanying text for a discussion of some of the

maritime activity. For example, in one United States Supreme Court case a longshoreman was knocked from a pier into the water. The case was held not to be within admiralty because the tortious act took place on the pier, a non-maritime location.[46] The converse of this result occurred a short time later in a case in which a longshoreman was knocked from his ship onto the pier. This case was heard in admiralty since the act occurred over water.[47]

The passage of the Death on the High Seas Act[48] in 1920 created further problems with the locality test. The Act was passed to remedy the absence of an action for wrongful death in substantive admiralty law. Jurisdiction was predicated upon the occurrence of the death at a point more than one maritime league from the shore.[49] When this act was passed, transoceanic flight was unknown.[50] In 1941, however, a court held that this act was applicable to deaths resulting from an airplane crash at sea.[51] This reasoning was later used to extend jurisdiction to tortious acts other than wrongful death.[52]

Many courts, strictly applying the locality test, allowed jurisdiction solely because a tort occurred on navigable waters. These cases include injury to a swimmer by a surfboard,[53] injuries to a waterskier,[54] and the crash of an aircraft into Boston Harbor shortly after takeoff.[55] Not all courts blindly followed this rule. The Sixth Circuit Court of Appeals set a precedent by refusing to recognize admiralty jurisdiction in a case brought by a swimmer injured while diving from a pier.[56] Eventually the United States Supreme Court addressed this issue in a case involving a plane crash into the navi-

problems that occurred. *See also*, White, *The Admiralty Jurisdiction Adrift*, 28 PITT. L. REV. 635 (1967).

46. Smith & Sons v. Taylor, 276 U.S. 179 (1928).

47. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935).

48. 46 U.S.C. §§ 761-68 (1976).

49. 46 U.S.C. § 761 (1976).

50. Lindbergh's celebrated flight did not occur until seven years later.

51. Choy v. Pan-American Airways Co., 1941 Am. Mar. Cas. 483 (S.D.N.Y. 1941).

52. Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965). Plaintiff in this case was jolted about and injured as she left the restroom on a transatlantic flight. The court held that this was within the purview of admiralty, based on *Choy*. *See, supra* note 50, and accompanying text.

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

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

55. Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963). The district court dismissed this case for want of jurisdiction, but the Third Circuit reversed on the ground that locality alone determines whether a tort is within admiralty jurisdiction.

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

gable waters of Lake Erie.[57] In *Executive Jet* the Court held that a maritime locality alone was not sufficient to invoke admiralty jurisdiction.[58] Claims would not be cognizable in admiralty unless a "significant relationship to traditional maritime activity"[59] was involved.

Unfortunately, *Executive Jet* did not completely resolve the jurisdictional questions. A common problem that courts confronted concerned whether non-commercial pleasure boats came under the jurisdiction of admiralty. At least one court held that traditional maritime activity referred to commercial activity and denied jurisdiction when non-commercial vessels were involved.[60] Other courts found that accidents between pleasure crafts were within admiralty jurisdiction.[61] In order to find jurisdiction present in *St. Hilaire Moye v. Henderson*,[62] the Eighth Circuit Court of Appeals relied heavily on the statutory interpretation of the term "vessel" as found in the United States Code.[63] In addition, the court found that there could be express statutory provisions which allow jurisdiction to be applied. The Extension of Admiralty Jurisdiction Act 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. . . ."[64] The need to resolve this confusion led to the grant of certiorari in *Foremost Insurance Co. v. Richardson*.[65]

In *Foremost*, the Court addressed only the narrow question of whether *Executive Jet Aviation v. City of Cleveland*[66] sub silentio overruled the earlier cases which granted admiralty jurisdiction when two vessels collided in navigable waters, regardless of whether

57. Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972).

58. *Id.* at 268.

59. *Id.*

60. Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973) (the court, in denying jurisdiction, relied upon the fact that maritime jurisdiction was born of a need to protect the domestic shipping industry and to provide a uniform body of rules to govern it).

61. St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974). *Accord* Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973) (pleasure boats damaged by an oil spill in the Santa Barbara channel within admiralty jurisdiction); Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973) (injury occurring on historical vessel now used as a permanent, dockside museum cognizable in admiralty).

62. 496 F.2d 973 (8th Cir. 1974).

63. 496 F.2d at 979 (quoting the Extension of Admiralty Jurisdiction Act of 1948, 62 Stat. 496, 46 U.S.C. § 740 (1970)).

64. 46 U.S.C. § 740 (1976).

65. 102 S. Ct. 2654, 2656 (1982).

66. 409 U.S. 249 (1972).

they were used for commercial or non-commercial purposes.[67] Justice Marshall, writing for the majority, concluded that *Executive Jet* did not overrule the prior cases, stating that there was a sufficiently substantial interest in the promotion of uniform rules of the sea to merit inclusion of pleasure boats in traditional maritime activities.[68] In addition, there could be potentially disruptive effects on commercial activities if two pleasure boats collided on a busy seaway. The Court thought that the interest of the federal government in protecting commerce is not strictly limited to the control of commercial vessels, since that interest could only be fully carried out if all operators of vessels on navigable waters are subject to federal jurisdiction.[69] Also, the Court did not interpret the traditional concern of admiralty jurisdiction as being limited to commercial vessels, but rather felt that it had been concerned with the rules of conduct of all vessels on the shipping lanes.[70] This, the Court thought, was sufficient to bring a collision between two pleasure boats within the meaning of the term "traditional maritime activity."[71]

The majority thought that a jurisdictional test tied to the status of the vessels could lead to problems similar to those that occurred with the locality test.[72] For example, under a commercial rule an accident occurring between two pleasure boats could still come under the jurisdiction of admiralty if one of the boats had been used for commercial fishing.[73] The Court declined "to inject the uncertainty inherent in such line drawing into maritime transportation."[74] Further, the majority thought that adopting a strictly commercial test would interfere with the goal of promoting the smooth flow of maritime traffic, since non-commercial navigators would be subject to different states' rules depending on their precise location within the territorial jurisdiction of one state or another.[75]

The Court also adopted the reasoning of *St. Hilaire Moye*[76] stating that, in the laws made to regulate maritime shipping, Congress intended the word "vessel" to apply to all vessels and not just

67. 102 S. Ct. at 2657.
68. *Id.* at 2660.
69. *Id.* at 2658.
70. *Id.*
71. *Id.*
72. *Id.* at 2659.
73. *Id.*
74. *Id.*
75. *Id.*
76. *See supra* notes 53-54 and accompanying text.

to commercial ones.[77] Based on the foregoing principles, the Court held that a complaint alleging a collision between two vessels on navigable waters states a claim cognizable in admiralty.[78]

Four Justices dissented, with Justice Powell writing the opinion.[79] The dissent viewed the majority opinion as an erosion of federalism and censured it as expanding federal jurisdiction at the expense of state interests.[80] No significant interests existed, the dissenters thought, that could justify this step.[81]

The dissenting Justices used, as authority for the exclusion of pleasure craft from admiralty, the historical argument that admiralty grew out of a need to protect commercial vessels.[82] They thought that the majority misconstrued the meaning of the term "traditional maritime activity" as used in *Executive Jet*. Furthermore, the dissenting Justices seemed to fear that this holding could resurrect, at least in part, the locality test since under this ruling admiralty jurisdiction could be invoked any time two vessels collided on navigable waters.[83]

Foremost Insurance Company is significant because it clarifies an uncertain area of admiralty law. In doing so, it accepts the twofold test which was presented in *Executive Jet*, locality coupled with a nexus to traditional maritime activity. It does not expand federal jurisdiction, as was argued by Justice Powell in the dissent, since courts before *Executive Jet* automatically assumed jurisdiction over this area. It does, however, reaffirm the holding that admiralty will not take jurisdiction over torts that occur on navigable waters based solely on locale. Justice Marshall pointed out that while the holding in *Executive Jet* was narrowly framed, it will now be widely construed, within the limitations set down in *Foremost*.[84]

One possible reason why a plaintiff might wish to bring a suit in the federal courts under admiralty law rather than in state courts is a procedural difference. In personam suits in admiralty are basically the same as those in other courts with one interesting difference: if a defendant cannot be found and served with process within

77. 102 S. Ct. at 2659.

78. *Id.* at 2660.

79. Joining Justice Powell were Chief Justice Burger, Justice Rehnquist, and Justice O'Connor.

80. 102 S. Ct. at 2660.

81. *Id.*

82. *Id.* at 2662.

83. *Id.*

84. *Id.* at 2658.

the district, and he has property within the district, the court will issue a "writ of foreign attachment" for the attachment and garnishment of that property.[85] Unlike most other forms of attachment, the plaintiff in admiralty is not required to post a bond for the property. A verified complaint and affidavit stating that the defendant cannot be found anywhere in the district are sufficient.[86] If, for example, two boats, one owned by an Arkansan and the other by an Oklahoman, collide in the Arkansas River at a location within Arkansas, it is possible that the Arkansan could not get personal jurisdiction over the Oklahoman. However, if the Oklahoman's boat were docked in Arkansas or he had other property in the state, admiralty jurisdiction could be obtained with a writ of foreign attachment by swearing out an affidavit.

State courts are, of course, as fully competent to hear cases involving pleasure boat accidents as they are to hear highway traffic accidents. Indeed, under the "Saving to the Suitors" clause,[87] most of these cases will probably still be brought in state courts. But the need is greater for a tribunal to exercise uniform authority over all boating accidents in shipping lanes than over traffic accidents on highways for two reasons. First, territorial boundaries are much less certain on the waterways than on the highways, and determining the state jurisdiction in which an accident occurred could be confusing. Second, there is no constitutional grant of jurisdiction to the federal courts over highways as there is over waterways.

While *Foremost* answers the question of whether pleasure boats come under admiralty jurisdiction, there are still unanswered questions concerning the limits of admiralty jurisdiction. One problem which might arise would be an accident involving a pleasure boat and a swimmer. A question also exists concerning the extent to which *Foremost* affects the holding in *Executive Jet*. While it would seem that *Executive Jet*, at the very least, precludes admiralty jurisdiction for airplane crashes, contrary results have been reached.[88] Each of these cases, in which jurisdiction was found in an aviation crash, relied on the fortuitousness of the accident in *Executive Jet*[89]

85. FED. R. CIV. P., Supp. Adm. R. "B".

86. *Id.*

87. 28 U.S.C. § 1333(1) (1976). *See supra* note 35 and accompanying text.

88. Higgenbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973) (helicopter crashing into the Gulf of Mexico under jurisdiction of admiralty since it was the functional equivalent of a crewboat); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D. V.I. 1973) (admiralty jurisdiction extends to accidents arising from flights by seaplanes over international waters).

89. The facts of *Executive Jet* put it outside the test of traditional maritime activity,

and on the fact that airplanes can engage in traditional maritime activity.[90]

Prior to *Foremost*, lower courts were often in conflict as to what constituted traditional maritime activity. A clear test was needed to resolve these conflicts between those desiring to expand jurisdiction into developing areas of law, and those desiring to limit jurisdiction to traditional commercial activity. In defining the test, the Court has apparently accepted the expansionist view by incorporating it into the definition of traditional activity. The result is a "locality plus" test which, once it is applied by the lower courts, could extensively broaden the scope of admiralty jurisdiction.

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since it was entirely fortuitous that the airplane crashed in navigable waters. The plane was flying an inland route and could just as easily have crashed on land. The Court in that case left open the possibility that an aircraft flying a route between foreign countries over international waters could be performing a task previously carried out by waterborne vessels. 409 U.S. at 271.

90. Some additional cases that illustrate aircrafts engaging in traditional maritime activity are: Roberts v. United States, 498 F.2d 520 (9th Cir. 1974) (transoceanic transportation of cargo by Air Force aircraft performing service traditionally done by ships); Hammill v. Olympic Airways, S.A., 398 F. Supp. 829 (D. D.C. 1975) (commercial aircraft on flight across Mediterranean Sea served function traditionally carried on by surface vessels); American Home Assurance Co. v. United States, 389 F. Supp. 657 (M.D. Pa. 1975) (while finding no admiralty jurisdiction, the court considered search and rescue operations by helicopter a traditional function of water borne craft).