In the

Supreme Court of the United States

EXECUTIVE JET AVIATION, INC., et al.,

Petitioners,

v.

CITY OF CLEVELAND, OHIO, et al.,

Respondents.

No. 71-678

Washington, D. C.
November 15, 1972

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Washington, D. C.,

Wednesday, November 15, 1972.

The above-entitled matter came on for argument at 11:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PHILLIP D. BOSTWICK, ESQ., 910 Seventeenth Street, N. W., Washington, D. C. 20006; for the Petitioners.

ERWIN N. GRISWOLD, ESQ., Solicitor General, Department of Justice, Washington, D. C. 20530; for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-678, Executive Jet Aviation against Cleveland, and others.

Mr. Bostwick, you may proceed.

ORAL ARGUMENT OF PHILLIP D. BOSTWICK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BOSTWICK: Mr. Chief Justice, and may it please the Court:

This case, on certiorari to the Sixth Circuit, calls upon this Court to resolve an irreconcilable conflict between the Third Circuit and an opinion in the court below.

The issue presented is whether the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the tortious conduct is alleged to have occurred on land.

The facts in this case are virtually undisputed. The petitioners are the owners and operator of a corporate twin-engine jet aircraft, known as the Falcon. They and their aircraft were prepared to take off from the Burke Lakefront Airport at Cleveland, Ohio, in July of 1968. Burke Lakefront is owned and operated by the respondent, City of Cleveland, Ohio, and is built on a fill in the navigable waters of Lake Erie.

On the day in question, the aircraft was piloted

by two pilots, and had a crew of one stewardess. It was prepared to take off to pick up passengers in Maine.

There is some question in the record as to the clearance given to the pilots before takeoff. It is our position that the questions of negligence and contributory negligence not being before this Court, those matters are irrelevant; however, they have been raised in the respondents' briefs.

In any event, there is no question about the fact that the pilots did not see -- could not see the other end of the runway before takeoff, could not see that the last third of the runway was covered by a flock of sea gulls, and did receive a clearance for takeoff from the Air Traffic Controllers in the tower, from respondent Dicken, who was employed by the United States Government.

The aircraft took off. Shortly after liftoff, the pilots noticed for the first time a sea of sea gulls. As the plane approached the sea gulls, the flock rose. The aircraft struck many of the birds; 314 of the sea gulls were found on the runway alone. Thereafter the birds were ingested into the engines of the jet. The engines flamed out, and the pilots prepared for a ditching. They raised the landing gear, and prepared for a crash landing.

On the way down, the aircraft landing gear did strike the top of a pickup truck parked near the airport

perimeter fence and broke the barbed wire of the perimeter fence. And there is an appendix of photographs to this case which shows the damage done to the vehicle and the fence, and the birds on the runway, for whatever use it may be to the Court.

In any event, the aircraft continued in flight and impacted in the navigable waters of Lake Erie. When airborne again it impacted a second time, where it sank in what has been undisputed as navigable waters, something of a depth in excess of 45 feet.

There is also a photograph, I believe it's photograph 3, showing an X out in the lake where the aircraft submerged. The pilots and the stewardess miraculously were not injured or killed. They exited from the aircraft, and a small craft picked them up. The Coast Guard came. There was an effort made to put a line around the aircraft and pull it towards shore, and the place where they succeeded in dragging it is the second X on the photograph.

QUESTION: This was a jet, right?

MR. BOSTWICK: It was a jet, yes, sir. It was a corporate jet, a small Falcon jet, owned by Executive Jet Aviation, and used for purposes of transporting business and other persons on business.

QUESTION: Were there any other persons aboard but the crew?

MR. BOSTWICK: The crew were deadheading, if the Court please, to pick up some revenue-paying passengers at another airport. It had been positioned at Burke Lakefront Airport.

The aircraft was salvaged, after remaining submerged in the lake for two days. Skin divers were used, a contract barge was used, and the aircraft was raised. It was dropped back into the lake during raising, and additional damage was done.

In any event, when it had been retrieved from the lake, after over two days, the extensive water soaking to the expensive avionics and navigational equipment, the instruments, and to the interior of the aircraft, the impact damage which had been done to the fuselage of the aircraft by the two impacts with the lake caused the aircraft to be a total loss.

And there is no dispute in this case of two facts: one, that the aircraft did crash in navigable waters of Lake Erie; and, two, that as a result of that crash in the lake, the aircraft was totally destroyed.

Two actions were brought by the petitioners in the federal court in Cleveland. One against the United States, under the Tort Claims Act, alleging negligence of the Air Traffic Controllers in clearing the aircraft for takeoff.

Because diversity was not existent between the

petitioners, a Columbus, Ohio, corporation and the City of Cleveland, the owner and operators of the airport, a second action was filed in federal court against the City of Cleveland and Respondent Dicken, also a resident of Ohio, alleging admiralty and maritime jurisdiction. The complaints are virtually identical. A motion to consolidate for discovery and all purposes, including trial, was made by the respondents.

The City of Cleveland moved, nearly three years ago, to dismiss the second action on the ground of no subject matter jurisdiction.

The district court, after six months, decided that there was no subject matter jurisdiction for two reasons: One, the locality of the tort was over land. The district court relied on a Sixth Circuit case entitled Wiper v. Great Lakes Engineering Company. As an alternative holding, the district court found that there was no maritime nexus between the wrongs alleged in the complaint and any maritime commerce, navigation, or service, relying on the Sixth Circuit case of Chapman v. Grosse Point Farms.

MR. CHIEF JUSTICE BURGER: I think we'll resume at that point after lunch, counsel.

MR. BOSTWICK: Thank you very much.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Bostwick, you may continue.

MR. BOSTWICK: Thank you, Your Honor.

The court below in this case, with one judge dissenting, affirmed the holding of the district court in so far as the court had ruled that the locality of the tort was over land. However, in so doing, it did not follow its own cases, but said this case was controlled by three cases from this Court, decided in 1928 and 1935. Minnie v. Port Huron, Smith & Son v. Taylor, and The Admiral Peoples.

The court below said that it was not necessary to reach the question of maritime nexus,having found that the locality of the tort was on land.

It's our position -- our argument is twofold, and it is that there is an irreconcilable conflict between the opinion of the court below on the question of the locality of the tort in this case and the Third Circuit's ruling in Weinstein; and we urge that this Court resolve that conflict by adopting the Weinstein rule.

We also urge that as to the question of maritime nexus, this Court follow the course that it took in 1914 in Atlantic Transport v. Imbrovek, and find that if anything more than the locality of the tort is required, that the relation-

ship between this tort and maritime affairs was quite sufficient.

Turning first with regard to locality of the tort: The Sixth Circuit in this case, relying upon the three cases that I just mentioned, found that the rule was, as to the situs of a tort, that the situs of a tort is where the negligence becomes operative or effective on the party, not where the damages or the major portion of them are sustained.

Under this legal rule, the court found that the negligence became operative when the birds first went through the engine and caused the loss of power to the aircraft, and that that occurred over the runway; therefore the locality of the tort in this case, the court found, was on land.

In so doing, the Sixth Circuit said that this ruling did not conflict with the Third Circuit decision in 1963, in Weinstein v. Eastern Airlines, found at 316 Fed 2d.

We respectfully submit that that portion of the court's opinion is unsupportable. The facts of the Weinstein case, one of the 150 cases to reach the federal courts, arising out of the Boston Harbor tragedy in the early 1960's, are virtually identical to this case. In the Boston Harbor tragedy, the facts of which are reported in Rapp v. Eastern Airlines, an Eastern Airlines Electra took off from Logan Airport, and six-tenths of a mile from the takeoff end of the runway it ran into a flight of starlings. The birds were

ingested into the engines, which were jet engines, driving propellers; 50 to 100 dead birds were found on the end of the runway. The birds caused an immediate loss of power, and the aircraft crashed thereafter in the navigable waters of Boston Harbor 47 seconds after liftoff.

The libelants brought libels in admiralty, and the respondents claimed that there was no jurisdiction. The district judge, Judge Van Dusen, found that the stuff of admiralty concerned vessels; that in the absence of any legislation by Congress concerning aircraft crashes in navigable territorial waters, that the admiralty did not have jurisdiction.

On appeal to the Third Circuit, the Third Circuit reversed that narrow view.

In an opinion written in 1963 by Chief Judge Biggs, which has been cited and quoted for nearly a decade thereafter, the Third Circuit held that "concepts of admiralty tort jurisdiction could not and should not remain static and unchanging."

In a review of the law, the court noted that the first aircraft crash cases arose out of the Death on the High Seas Act, and that the same arguments had been made, to wit, that the Act did not apply to aircraft crashes. That view had been rejected.

Now, in this first case of the crash into territorial

navigable waters, Chief Judge Biggs found that the applicable precedent from this Court was The Plymouth, and that the historic view of this Court, indeed, as expressed against by this Court last term in Victory Carriers v. Law, was that the locality of the tort determined whether or not it was of a maritime nature.

In determining where a tort occurs, Chief Judge Biggs looked at The Plymouth, a case from this Court, which held that a tort occurs where the damages are completed or a substantial amount of the damages are completed; and The Plymouth held that the maritime jurisdiction depends upon the locality where the injuries or the substantial portion of them take place.

Having concluded that The Plymouth was the applicable authority, the Third Circuit found that even though the alleged negligence in the Boston Harbor tragedy was alleged negligent maintenance on land and defective design of the aircraft, that the, quote,"disastrous effects", close quote, of that tortious conduct had occurred on navigable waters. That is to say, the crash itself, the damage to the aircraft, the injury and the death to the passengers therein, had occurred on navigable waters.

It therefore found, in a case virtually identical to this on a factual situation, that the tort occurred in navigable waters and therefore it was a maritime tort. It was

argued to the Third Circuit that a maritime nexus was also required in addition to locality, and that no nexus should be found in a case in which an aircraft, which was headed from Boston to Philadelphia, virtually all over land, had crashed fortuitously in the waters of Boston Harbor.

That view was rejected by the Third Circuit on the reasoning that there is an analogy between aircraft which go down in navigable waters and ships which sink in navigable waters. And they found that there is a connection, there is a similarity, and that the dangers to person's property are the same when an aircraft crashes in navigable waters.

Therefore, they assumed, for purposes of argument, that if there was such a locality plus requirement, that it was present in that case, and therefore they held that there was maritime jurisdiction.

Certiorari was denied by this Court.

That case has been followed and cited in nearly a decade, since it was passed down.

QUESTION: That means that if you fly from New York or Washington to Miami or Palm Beach, Florida, at varying times you're under admiralty, maritime jurisdiction or under conventional common-law jurisdiction?

MR. BOSTWICK: Well, Mr. Chief Justice, --

QUESTION: If you're out over the sea, a good deal of the time on that trip, aren't you?

MR. BOSTWICK: We believe that the jurisdictional point arises if there is a crash on that flight. There was some discussion in the early days of aviation concerning whether the airspace above the entire earth as well as the sea was subject to maritime jurisdiction, but, as a matter of fact, the Federal Aviation Act is based upon the commerce clause, and the regulations which affect aircraft passing over States and over water and land is based upon that clause. But where there is a crash on that flight, whether it is beyond one marine league from the shore, whether it is 2400 yards off the Florida coast, as was the case in Kelly, or whether it is next to the Miami Airport, to the closest navigable water on takeoff or landing. If the crash occurs in navigable water, it is our position that this Court should find and enunciate the following rule:

That when an aircraft crashes in navigable water, tort claims arising therefrom are cognizable in admiralty. The reason we urge that is that we believe it to be the more practical, the simpler, and the more just and efficient rule for aviation cases. And we -- it is our position, and it was so held by the Third Circuit and stated, we think, artistically by Judge Edwards in the dissent in this case, that we believe that -- excuse me, let me start over again, my syntax is a little too long.

QUESTION: Let me interrupt you right there. What

would logically follow from that sort of a holding, other than just the law governing the crash? Would you have a doctrine of unseaworthiness or unairworthiness or airplanes where, say, a crew member sli-ped, without there ever being a crash, if it happened over water, that he would have a claim under the Seas Shipping vs. Sieracki, and that sort of case?

MR. BOSTWICK: Well, Mr. Justice Rehnquist, what would follow, we say, is that the general maritime law would be applicable, and that, as has gone on for the past thirty years in those aircraft crashes beyond a marine league from the shore, the Death on the High Meas Act would be applicable.

QUESTION: But what if you don't have a crash at all? Supposing just while the plane is navigating over Biscayne Bay, coming into Miami, some crew member slips and falls -- nothing ever happens to the plane except it lands at Miami. But if that slip and fall occurs over navigable water, does t hat mean it's an admiralty type of injury?

MR. BOSTWICK: There is a case like that, Your Honor, it's D'Aleman, it's a Second Circuit case; I believe it's cited in the government's brief. And a person did suffer a fright on a flight from Puerto Rico to the United States over water and died thereafter, and it was held to be in admiralty.

And I would refer the Court to the analogy of the Congress making crimes which occur in aircraft over navigable

waters within the maritime jurisdiction. It is in fact, the injury which occurs on or over navigable waters which makes it a maritime tort, and brings into play the general maritime law.

And that, in effect, --

QUESTION: What about crashes on bridges?

MR. BOSTWICK: You mean an aircraft crashing on a bridge, Your Honor?

QUESTION: No, an automobile crash on a bridge, over navigable waters.

MR. BOSTWICK: Well, we don't believe that this Court is going to be required to rule on the automobile cases in this case. We believe that a holding in this case that when an aircraft crashes in navigable waters, the tort claims arising therefrom are within maritime jurisdiction, does not call upon this Court to decide that case. In fact, there is a case of an automobile driving off of a pontoon barge in --

QUESTION: That's right.

MR. BOSTWICK: -- in New Orleans, and the car that was going from the ferry to the land was in admiralty, and the one going the other way was not. And, in fact, there's a myriad of decisions --

QUESTION: Well, what would your holding be for the car that drives off the bridge into navigable waters?

MR. BOSTWICK: Well, for the car that drives off the bridge into navigable waters, if the person is killed --

QUESTION: Let's assume he's hit. He's hit on the bridge and he's -- damage done to the car and some damage to him, but off into the water and he's hurt more. He doesn't die.

MR. BOSTWICK: If the person were injured in the water, we believe it would be a maritime tort. But, again, we respectfully state that it is the nature of the aviation activities here which cause us to urge the present ruling upon the Court. We are not urging a rule upon the Court in automobile cases, and I'm not trying to duck the Court's question.

However, in a --

QUESTION: Well, I don't know that -- I don't know how you'd limit the principle if the plane crashing in navigable waters raises a maritime issue, I don't know why an automobile wouldn't also. Do you?

MR. BOSTWICK: I'll be as specific as I can, if the Court please.

QUESTION: Mr. Bostwick, right on that, you have as one of your important premises, if not major premises, that the airplane is supplanting seagoing ships as the major means of transportation.

Now, when you go to Key West these days from the

mainland of Florida, you travel over something like 60 to 90 miles that was once traversed by boats, and now there's a great causeway and you're over -- not just over an ordinary navigable stream, you're over the sea, the Atlantic Ocean, the Caribbean and the Gulf.

Now, your premise would certainly make an automobile which hits the railing and goes down into the water a maritime case, wouldn't it?

MR. BOSTWICK: Well, if the Court please, I believe -- the government has urged that this Court use this case to fashion a locality-plus rule. For once we agree with the city, the respondent, the City of Cleveland, in the view that that is not required in this case. We believe that a holding in this case concerning aircraft crashes in navigable waters does not require the Court to make a statement about the type of hypothetical which has been presented. And it leaves the lower courts free, in a situation where a swimmer is injured in 18 inches of water, where there's a rear-end collision on a pontoon barge between two automobiles waiting for a ferry. It leaves the lower courts free to continue to decide those few -- and I emphasize the fact that they are few -- to decide those few cases, if they so decide, on a locality-plus basis.

We do not believe that this case raises the locality-plus question, and that the hypotheticals concerning the

automobiles need to be decided because of the ruling in this case that aircraft crashes in navigable waters bring about maritime tort claims.

QUESTION: It's strictly on a locality basis?

MR. BOSTWICK: The locality basis has to do with the aviation cases because, assuming arguendo there is a plus required, that it is present in the aviation cases. We do not believe that it's present only in those cases where the aircraft is being used, as it was previously used, like a vessel or whether 90 percent of its flight has been over water as opposed to 5 percent over land.

QUESTION: What's the plus?

MR. BOSTWICK: Well, that's, if the Court please, a good question and I've been unable --

QUESTION: Well, I thought I understood you to say, Mr. Bostwick, that if there is a locality-plus, it satisfies you. What is it? What is the plus?

MR. BOSTWICK: Oh. Excuse me. We believe it to be the same plus stated by the Third Circuit in Weinstein and by the dissenting judge in this case, that is, the relationship between a downed aircraft in navigable waters and the perils that occur to the pilots and the passengers and the analogy to a downed ship.

In other words, there is nothing fortuitous to a man who is drowning in navigable waters, whether he got there

because his boat tipped over or because his airplane crashed in it, just off the shore. There's an analogy between the salvage problems, the navigational problems in the channel.

QUESTION: Well, those are true of automobiles, too. I mean, the guy can drown if he drives off a bridge into navigable waters.

MR. BOSTWICK: Mr. Justice Rehnquist, I am not taking the position that an automobile is necessarily outside, an automobile crash in which people are killed going off a bridge is necessarily outside of admiralty jurisdiction. And, as I say, there are some cases in which admiralty has taken cognizance over automobile cases.

But I respectfully do not believe the Court needs to reach that here by holding that in aviation cases there is -- that the tort claims arising out of crashes in navigable waters --

QUESTION: Well, Justice Brennan, though, asked you what is the plus here, and, as I understand your answer, it's that because the aircraft went down in navigable water, the people in the aircraft confront basically the same problem that people going down in a ship confront.

And I wish to add the comment that I don't think either of those problems are distinguishable from the people who are in a car, about to drown in navigable water. If there's going to be a plus that separates aircraft from

automobiles, there's got to be some, other than what you've said.

MR. BOSTWICK: Very well. And, as a matter of fact, the court in New Orleans agreed and found that the injuries as a result of drowning, and that the horror that goes along with seeing your husband drown meant that an automobile crash into navigable waters was in admiralty.

So, therefore, I am not taking the position that the automobile case is not in admiralty.

QUESTION: Mr. Bostwick, --

MR. BOSTWICK: Yes, sir.

QUESTION: -- assuming that this automobile goes over the rail as a result of an accident, being struck by another automobile, which law would apply?

MR. BOSTWICK: Well, if the --

QUESTION: Assuming that the car is going over the State speed limit, you can't apply that into navigable waters.

MR. BOSTWICK: Well, if the crash occurs, the automobile crash occurred and a person were drowned in navigable waters, we believe that the wrongful death claim would come about under this State's -- under this Court's holding in Moragne that there --

QUESTION: And what law would apply?

MR. BOSTWICK: General maritime law would apply --

QUESTION: To the automobile accident up on the bridge?

MR. BOSTWICK: To the automobile accident, in which the car goes into the navigable water. I thought that that was your question.

QUESTION: Yes. But the accident occurred up on the bridge.

MR. BOSTWICK: Oh, well, --

QUESTION: And he is struck, and as a result of being struck by the other car he went over into the navigable water. Now, who's at fault?

MR. BOSTWICK: Well, it's our view that if the person died as a result of being in navigable water, then the fault would be determined by the general maritime principles, which utilize comparative negligence and have a cause of action for wrongful death. And there is, I might say, an additional distinction about --

QUESTION: But it certainly wouldn't be decided whether or not it's got grease on the step, to make it unseaworthy; you couldn't decide it on that basis?

MR. BOSTWICK: No, sir.

I wish to reserve a few moments in rebuttal, but in answer to your question, Mr. Justice Rehnquist, the aircraft which fly over navigable waters, as distinguished from automobiles, do have a maritime plus in that the majority of

the passengers which used to travel by boat now travel by air, and there is a need, there is a vast number of aviation accidents because of the number of airports built and around navigable waters, and the number of accidents which occur in and around the landing patterns. There is a large number of aircraft crashes in navigable waters and territorial navigable waters, and we believe that they present a problem which has been solved by the lower courts under Weinstein, and that that rule is the proper one which should be continued and ratified by this Court.

QUESTION: Well, that's the position the government takes, isn't it; isn't that the nexus the government suggests for the maritime connection?

MR. BOSTWICK: Well, it's my understanding that the government would find that in some aircraft crashes, for example, the plane that lands in the water on the flight from Washington to Chicago but which lands in Lake Michigan, fortuitously, that that would not be a maritime nexus, not a maritime case, because --

QUESTION: Yes, but a flight from Chicago to Washington, D. C., that happens to go into Lake Michigan, isn't much of a substitute for a steamship to Washington.

MR. BOSTWICK: It's no substitute at all, Your Honor.

QUESTION: Yes.

MR. BOSTWICK: But the fact of the matter is that people who are faced with possibly drowning in Lake Michigan meet the same perils as anyone else in navigable waters.

QUESTION: Well now, you've got a different nexus now.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

I think that this is the first time that I have ever been a proctor in admiralty, to which I was admitted some years ago.

Let me start by restating the facts of the case, which are illustrated by this chart, which appears in the brief for the City of Cleveland it is Plaintiffs' Exhibit 4, in the case.

North is to the right, which is perhaps a little misleading; but if I tilt the chart to the side, then the lettering is hard to read.

The plane started here at the runway, at the gate; came to the end of the 6 Left runway and started down the runway to the northeast.

At this place where it says "Rotate Area", that is airplane language for takeoff. What you do is rotate the

nose of the plane, and the takeoff was between 2800 and 3,000 feet, down the runway.

The bird area was between 3600 feet and 6200 feet; but before the plane had left the end of the runway, the control tower had said, "Caution, birds on end of runway", and that appears on page 14 of the record; and then had added, "It looks like there are a million of them."

Now, the plane started down, nevertheless, and took off at 2800 feet. When it took off, the birds flushed into the air. The plane hit the birds in this area, over land; as Mr. Bostwick has said, 314 dead birds were found on the runway, on land; and the engines of the plane were filled with ingested birds.

The plane immediately lost power. The pilot endeavored to take what steps he could to get out of the situation. He hit the perimeter fence of the airport here, and a truck which was parked at the end of the airport; and this statement on the exhibit, "E McA" is Mr. McAvoy's initials, which he put on the exhibit to indicate that that is the point where the truck was hit. All of this, of course, is on land.

By this time the plane is almost hopelessly disabled, and it was a miracle that it finally came through and the three persons on board came out.

These dotted lines are the course of the plane after

hitting the truck. They, too, were put on the exhibit as the testimony of Mr. McAvoy.

QUESTION: Who is Mr. McAvoy?

MR. GRISWOLD: Mr. McAvoy is a witness for the plaintiff.

And the plane finally came to rest in the water here, and this "E McA 9" is Mr. McAvoy's testimony that that represents the place where it came to rest.

I may point out that this is the Cleveland breakwater here, all of this is inside the breakwater. That does not mean that it is not navigable water, but it is not the high seas on the lake, so to speak.

Now, there is a reference in the briefs to the fact that the plane came to rest a fifth of a mile from the end of the runway. That is literally true, this being the end of the runway, and it's a fifth of a mile to there. But it was only 30 or 40 feet from land to the north that the plane came to rest.

It's clear that the damage to the engines was done and completed before the plane hit the water. It is also clear that there was substantial damage to the airframe, from hitting the fence and the truck, and the birds, before the plane hit the water.

QUESTION: Mr. Solicitor General, where did you say the aircraft was when the tower warned that there were a million

birds?

MR. GRISWOLD: The aircraft was here at the end of the runway, at the beginning of the runway, before takeoff.

QUESTION: And it had not commenced its run?

MR. GRISWOLD: I'm sorry, sir?

QUESTION: The aircraft had not started down the --

MR. GRISWOLD: The aircraft had not started into the air at the time the warning was given.

QUESTION: Could the flight have been aborted?

MR. GRISWOLD: Well, --

QUESTION: That is -- I mean by that --

MR. GRISWOLD: -- the flight need not have started at all.

QUESTION: Well, I mean -- was that the choice of the pilot? It could not have been aborted by the tower?

MR. GRISWOLD: Yes, the tower could have instructed them not to go off.

QUESTION: I mean, if he was talking about a million birds, that --

MR. GRISWOLD: That, after you have given the pilot the information, there is quite a bit of practice in the air industry that the decision is up to the pilot, --

QUESTION: Well, that's what I --

MR. GRISWOLD: -- not to the control tower.

This has not been tried in this case. I suppose

this bears on the question of comparative negligence, which might be relevant in admiralty; and contributory negligence, which would be relevant if it is not in admiralty.

Now, the district court in this case dismissed the libel in admiralty. It found that it is manifest that the alleged negligence became operative upon the aircraft while it was over the land, and it added that whether it came down upon land or upon water was largely fortuitous.

And the Court of Appeals affirmed on the ground that the tort occurred on land. It said in its opinion that "the alleged tort ... occurred on land", even though the plane fell into navigable waters shortly after takeoff from the airport, and that no right of action is cognizable in admiralty.

QUESTION: What did you -- what do you understand, then, their meaning when they say that the tort occurred on land? As I understand it, of the three events here, two of them occurred on land and one on water. One is the alleged negligence, i.e., the failure to tell them not to take off. That was obviously on land.

No. 2 was the infliction of the initial damage by the birds and by the fence and so on. And that occurred on land.

And only the third occurred on water, which was the eventual loss of the airplane.

MR. GRISWOLD: Well, I would say No. 3 --

QUESTION: Were they talking about No. 1 or No. 2 when they said that tort occurred on land?

MR. GRISWOLD: And No. 3 is hitting the --

QUESTION: Well, I include that with the birds.

MR. GRISWOLD: -- fence and truck. Perhaps. Yes, that is perfectly --

QUESTION: Well, they were talking about No. 1, i.e., the negligence, or were they talking about No. 2?

MR. GRISWOLD: I don't know, Mr. Justice, I suppose that's a part of the issue in this case.

QUESTION: Well, I was just wondering what -- how you understood the district court and the Court of Appeals.

MR. GRISWOLD: There are two defendants here, one, the City of Cleveland, who Mr. Crocker represents, and the other, the tower controller, an employee of the Federal Government, whom I represent. Mr. Crocker has generously given all of the time to me, but I am in a very real sense representing the City of Cleveland as well as the airport controller; and Mr. Crocker relies more heavily on this question of where was the tort than I do, and I'm sure that the Court will give careful consideration to his brief.

This was the ground upon which the Sixth Circuit Court of Appeals decided the case, and it relied primarily on three decisions.

Now, I know it is perfectly easy to go through this

Court's admiralty cases, over a hundred years, and find a case such as the one Mr. Bostwick referred to, The Plymouth, which rather refers to the consequences rather than to the point of impact.

The three cases which the Sixth Circuit relied on, Smith & Son v. Taylor, Minnie v. Port Huron Terminal Company, and finally The Admiral Peoples, are all cases in which the Court made the decision between admiralty and non-admiralty turn on the point of injury, in the sense of the point of impact.

In Smith & Son v. Taylor, a longshoreman was standing on a stage which rested on a wharf and projected a few feet over the water. He was struck by a sling loaded with cargo, which was lowered over the side from the ship, and knocked into the water. And the Court held that that was the -- the tort was on land and not in sea, and there could be no maritime recovery.

The next case, Minnie v. Port Huron Terminal Company, is almost exactly the converse; and The Admiral Peoples is a gangplank case, a slip and fall. He slipped and fell on the gangplank and hit the wharf, and that was held to be a ship injury because the slip and fall was on the gangplank.

Now, the only case that really deals with this kind of an accident is the Third Circuit's decision in Weinstein v. Eastern Airlines, and I would like to point out that, though

that decision is certainly doctrinely inconsistent with the Sixth Circuit, no facts appeared in that case which are anything like the facts which have been shown here with respect to the injuries on and over land.

For the Weinstein case arose on a motion to dismiss, and the libel said that shortly after the aircraft had become airborne, by reason of the negligence of the respondents, and by virtue of their respective breach of warranty, said aircraft crashed into the navigable waters of Boston Harbor, period.

And that is all the allegation there is; there is no allegation there that anything happened on or above the land, and the issue arose on the exceptions of the Eastern Airlines. The facts averred in the libel do not constitute a cause of action against Eastern Airlines, Inc., within the admiralty jurisdiction of this Court.

I would like to devote the -- I think the factual situation is clear to the Court, and the bases of the decision below appear clearly in its opinion, and we rely on that; but I would like to devote the rest of my argument to the broader question: Should admiralty law apply to an airplane crash of this sort?

By that I am not waiving the place of the tort argument, I am seeking to present a broader ground.

The only reason that I can think of for bringing

this within admiralty is a purely verbal one, namely that admiralty applies to the sea, or, in this country, to inland navigable waters; and this plane landed in the water, ergo, admiralty jurisdiction.

But even on a verbal basis, if we start by saying that admiralty relates to ships, then this case does not involve a ship, ergo, no admiralty jurisdiction.

Obviously, both of these approaches are essentially formal. I'm not suggesting at all, of course, that admiralty must be confined to exactly what it covered in 1787 or 1789; obviously the Constitution should be construed so as to accommodate new developments. Admiralty took in steamships when they came, and admiralty was rightly extended to the inland navigable waters of the United States, which were something not paralleled in Britain.

Similarly, the Constitution gives Congress power with respect to an army and a navy, and no one questions that that applies also to an air force.

But it does not follow that admiralty should extend to every tort which occurs on water, if this tort did occur on water, and specifically it does not follow the admiralty jurisdiction should be found to extend to airplane accidents of the sort involved here.

There is no decision of this Court saying that any sort of airplane accident is within admiralty jurisdiction.

There are not even any decisions of this Court applying the Death on the High Seas Act to an airplane accident. Thus, this Court will not have to overrule any of its decisions, or make any break in its established law, if it comes to the conclusion that airplane accidents, at least of the sort involved here, do not come within admiralty jurisdiction.

The leading case to the contrary is the Weinstein case, a careful and thoughtful opinion by Judge Biggs. However, it's perhaps worthy of note that Judge Van Dusen was the trial judge in that case. He decided to the contrary, and Judge Van Dusen is now on the Third Circuit Court of Appeals.

Indeed, there was a certain amount of what laymen, at least, might regard as lawyers playing games, in the whole Eastern Airlines situation. The crash occurred in Massachusetts, but that State has a narrow wrongful death statute, with a limit on recovery fixed at $20,000. So the suit was started in Pennsylvania, where there is no such limitation. And the Court of Appeals held there was admiralty jurisdiction.

After that, though, counsel apparently gave further thought, and feared that the court in admiralty might find that the Massachusetts statute was applicable, because of the strength of these place of the tort decisions.

And so suits were then brought on the law side of the Pennsylvania court, based on diversity of citizenship,

which was easy to do because you can appoint a non-resident administrator, and the suit was not based on the tort but was based on breach of a contract of safe carriage, as to which it was held that the Pennsylvania law applied.

And this is what was sustained by the Court of Appeals in a four-to-three decision in Scott v. Eastern Airlines company.

This Court denied certiorari in both of the Third Circuit cases, but that is as far as it has gone on this problem.

Why should not admiralty law apply to all torts which occur or indeed come to rest on navigable water? One may as well ask the opposite question: Why should admiralty law apply to all such torts, when they have nothing to do with ships?

There is a fundamental difference between ships and airplanes, apart from the fact that ships float on the sea and airplanes go through the air. This is that ships always stay in the water. Of course they can go aground, but the water puts them there; and they can be put in drydock, but it's appropriately been held that since they float there, that that's within admiralty jurisdiction.

The sea is the nourishing source for a ship, but an airplane is based on the ground. It flies equally well over land as over sea. Whether it ever goes over the sea and

when it is over navigable waters it is largely fortuitous, has nothing whatever to do with what, by analogy, we call the navigation of the airplane.

Let us take the case of a plane which flies from New York to San Francisco. It leaves the airport and circles over navigable waters as it picks up its westward course. Then it crosses the Hudson River, a navigable waterway, and after a while it crosses the Ohio River, and then the Mississippi, and then the Missouri. In due course it crosses the Upper Colorado River, and the Great Salt Lake, both of which have been held by this Court to be navigable. It crosses the Sacramento River, and then comes down across San Francisco Bay, at a point where the water is very shallow, perhaps it circles over the Pacific Ocean before coming in for a landing.

Does it make any sense to say that tort liability is a matter of State law, except in the cases where, if there is a crash, the plane chances to hit a waterway, navigable by ships, within a State? If it bounces on the shore and comes to rest in the Mississippi River, which is essentially what it did here, then it's a matter for admiralty jurisdiction. Despite the fact that the whole venture bears no relation whatever to maritime commerce.

Yet that was the situation in the Eastern Airlines case, the plane came to rest a few feet in the water, in the

Boston Harbor; that's the case here, where admiralty jurisdiction is claimed to rest on the place where the plane stopped, after a land activity.

QUESTION: I suppose, too, Mr. Solicitor General, you could have an approach to the Washington airport that would bounce the airplane off of the Potomac and onto dry land on the runway, if it missed by a few feet?

MR. GRISWOLD: That would be the converse, and presumably that would not be in admiralty if it stopped on dry land.

The problems which can be encountered if one takes the verbal or formal view that admiralty jurisdiction extends to everything that happens on navigable waters can be illustrated by a number of decisions in the lower courts. Some have already been referred to here, in the autos that fall off of bridges; but there have been cases on this.

A district court in Florida has held that a suit by a swimmer, who was struck by a surfboard, is within admiralty jurisdiction. A district court in Tennessee has held that an injury to a water skier is within admiralty jurisdiction.

Other courts have gone the other way. A district court in New York has held that a woman who was injured by a submerged object while bathing at a public beach cannot maintain a suit in admiralty.

And the court below has held, in other cases, that a swimmer who dove from the municipal dock into 18 inches of water, alleging negligence in failing to construct guard rails and post warning signs, could not maintain a suit in admiralty.

And in another case where the decedent fell from a dock and was drowned, the court held there was no maritime jurisdiction.

Finally, in Gowdy v. United States, an electrician was injured while repairing the machinery inside a lighthouse on a breakwater. He brought a libel in admiralty, and this was dismissed because the injury bore no relation to maritime commerce or navigation.

This Court denied certiorari in both -- two of these Sixth Circuit cases, which perhaps evens the score from the two denials in the Eastern Airlines case.

Apparently the earliest case involving an airplane, which crashed in navigable waters, was decided in 1914, nearly sixty years ago. That was the Crawford Brothers No. 2, and that's the name of an airplane, not of a ship.

That was a libel in rem for repairs to an airplane which fell into Puget Sound. An intervening libelant asserted a salvage claim, and the Court held that there was no jurisdiction in admiralty, saying "they are neither of the land nor sea, and not being of the sea, or restricted in their

activity to navigable waters, they are not maritime."

Now, reference may well be made to the Death on the High Seas Act, which was enacted in 1920, the text of which appears on page 21 of our brief.

There is no reference in that statute, or in its legislative history, to airplanes. It applies -- it is a Lord Campbell's act, changing the common law so as to provide a cause of action for wrongful death, in its terms, occurring on the high seas.

Congress made the Death on the High seas Act applicable, quote, "On the high seas, beyond a marine league from the shore of any State," thus indicating rather clearly its understanding that the laws of the States were applicable in territorial waters, which is what we have here; and that there was no need to extend admiralty jurisdiction to them.

Many courts have held, and I think rightly, that the Death on the High Seas Act applies to airplane accidents. Air crashes do come within the literal language of the statute, where the ultimate impact of the crash is on the high seas.

It is true that Congress said that suit under the Death on the High weas Act should be in admiralty. As to deaths on or in connection with ships, this is of course clear, and within traditional admiralty jurisdiction. Congress was not thinking of airplane accidents when it passed

this statute. There was no need for it to extend admiralty jurisdiction to airplane crashes causing death, for it would have had ample power to provide for recovery for wrongful death in air accidents under its power to regulate interstate and foreign commerce, and not to mention the broad powers which can be found in the Curtiss-Wright decision of this Court.

When the statute is properly extended to airplane accidents, it may well be that it should not be construed to mean that such suits are actually in admiralty, but, rather, that Congress prescribes that the recovery, though at law, should be as if in admiralty, somewhat as the State law was applied by this Court as a part of federal law in the marine case decided a year or so ago.

That is, with the measure of recovery in such things as comparative negligence, to be determined by the standards of the admiralty rules.

As long as the law stays in its present state, we will have innumerable, fruitless, borderline problems such as this. And results in particular cases will be fortuitous and understandable only to the most intricately minded lawyers. There will be disputes as to where the tort occurred, the doubts about the question that Mr. Justice Stewart asked me, and whether the controlling factor is where the impact occurred, which made it inevitable that the plane would crash, or whether the question on which

jurisdiction turns is where the plane came to rest.

As I see it, there are several ways in which the question can be disposed of. First, the Court can hold, as I think it should, that airplane crashes having no connection with a ship do not come within admiralty jurisdiction. As I have said, this Court would not have to overrule any of its decisions to reach such a result, and such a decision would be in accord with current, modern British law. There is a British statute which provides that His Majesty, by order and counsel, may provide the court and the rules which apply to airplanes, and the only order that has ever been issued is that actions by or against an airplane, with respect to salvage, pilotage, and towage shall be in admiralty; but nothing else.

And those three items, it makes a certain amount of sense to have it in admiralty.

QUESTION: Under this first proposed test, Mr. Solicitor General, do I understand correctly that you would say if a plane was flying from New York to London and crashed in mid-Atlantic, on account of somebody's negligence, that admiralty there would have jurisdiction?

MR. GRISWOLD: My position on this is that that would not be in admiralty.

QUESTION: That would not be?

MR. GRISWOLD: That that would not be.

QUESTION: Even though it had nothing --

MR. GRISWOLD: It had nothing to do with a ship. That --

QUESTION: But the Death on the High Seas Act --

MR. GRISWOLD: The Death on the High Seas Act would apply, because Congress has power to enact it under the interstate and foreign commerce power.

QUESTION: But that even in international flights, such as that across the Atlantic or across the Pacific, that would not be in admiralty, even though the --

MR. GRISWOLD: That is the position which I am seeking to advance to the Court --

QUESTION: Okay. I misunderstood.

MR. GRISWOLD: -- and the one that seems to me to, when you get all through with it, to work out the most satisfactory. I can think of no reason why there should be. Airplanes are not ships. When the admiralty developed, ships had no power of their own, they were large structures floating on the water, subject to the vagaries of winds and tides and currents, and always subject to the risk of collision no matter how careful the master or the pilot might be.

It was in this situation that the rules of comparative negligence developed in admiralty. No one contends that airplane crew members are entitled to maintenance

and cure, or that they are wards of the admiralty. I know of no case applying the admiralty doctrine of general average to an airplane, nor is the law of limitation of liability applicable to them. After all, an airplane after it's crashed is about as worthless -- in the water, is about as worthless as anything can be. A mortgage on an airplane is not a maritime contract, and a suit on such a security interest cannot be brought in admiralty.

Having gone so far to recognize that airplanes are not ships, and they are not within admiralty jurisdiction, it might be well to hold that they are not within admiralty jurisdiction for tort purposes, thus eliminating a number of fruitless line-drawing problems, if airplanes are held to be within admiralty for some purposes and not for others.

QUESTION: Well, Mr. Solicitor General, in your brief you say, In our view an aircraft may be said to bear a significant relationship to maritime commerce and navigation only when it is performing functions previously performed by ships, or vessels.

MR. GRISWOLD: Yes, Mr. Justice, my oral argument goes beyond the brief. I have allowed the processes of thought to take effect, and --

QUESTION: Yes.

[Laughter.]

QUESTION: Well, I must say, we all misunderstood

your argument and so on.

MR. GRISWOLD: As I have worked on this case, I have found myself less willing to stand on that ground which is the broad ground of the Sixth Circuit; and as it became more clear to me that there is no decision of this Court that has to be overruled, qualified, the Court has never dealt with the problem.

QUESTION: Well, the only thing is you do have to ignore the plain words of the congressional Act to do --

MR. GRISWOLD: No, Mr. Justice.

QUESTION: Why not?

MR. GRISWOLD: Because the --

QUESTION: It says "in admiralty", doesn't it?

MR. GRISWOLD: And Congress may well have power to extend it to admiralty.

QUESTION: Well, it does say "in admiralty".

MR. GRISWOLD: All right. But Congress didn't have the slightest idea that it was talking about airplanes when it passed that statute.

QUESTION: Well, that may be so, but you still say the Death on the High Seas Act applies.

MR. GRISWOLD: I say the Death on the High Seas Act applies because Congress -- because it makes sense to apply it to all the circumstances, and Congress has power to enact it under the foreign commerce power, even though it

may not have had power to do --

QUESTION: Yes, but you would say to the total Court that this action may not be in admiralty?

MR. GRISWOLD: I am --

QUESTION: And the Congress says it should be.

MR. GRISWOLD: My basic argument is that -- it's not presented in our brief -- that this does not fall within the admiralty power.

QUESTION: And nowhere in the tort law , with respect to aviation, has nothing to do with admiralty?

MR. GRISWOLD: Unless perhaps the airplane hits a ship, which --

QUESTION: How about a seaplane?

MR. GRISWOLD: A seaplane is another matter. I --

QUESTION: It's like a sea gull, isn't it?

[Laughter.]

MR. GRISWOLD: No, but hydroplanes is another matter.

If this were done, all the nitpicking involved in this case would be eliminated if the crash occurred in territorial waters as was true of the crash here, the law of the State would apply, as would be the case if this plane had ended up on the end of the runway. If the crash occurred on the high seas, the State courts would have jurisdiction, or the federal courts might have jurisdiction in diversity cases, or Congress could extend jurisdiction generally to the

federal courts, since interstate or foreign commerce is necessarily involved. The Death on the High Seas Act would be applicable.

I'm troubled about the word "admiralty" in the statute. If there was a non-fatal crash or if there was a suit with respect to loss of property, the courts could fashion a common law remedy, or Congress could legislate if that was thought necessary.

Now, my time has expired, but my second alternative would be to say that this case only involves territorial waters, and at least as far as territorial waters is concerned, it is not admiralty. As to the international flight to London, the Court could either hold or leave open the question whether crashes outside the limits of any State are within admiralty jurisdiction.

My third ground would be essentially that of the Sixth Circuit Court of Appeals, and that taken in our brief, that there must be some kind of a maritime nexus which we contend is not adequately found merely by reason of the fact that the crash comes to rest in the navigable waters, and, finally, the Court could hold that: yes, it is admiralty, but the important place, if it is admiralty, is where the impact takes place. Here the impact was over the sine qua non, the event beyond which there was no way to avoid the crash, occurred over land, and it was on that ground that

the court below decided the case.

It seems to me that the Court is confronted here with something,in a sense, a little like the situation presented by The Genesee Chief, where the Court extended admiralty to the inland waters. Here we have a new means of transportation, we have two generations of experience with it; nothing has indicated any reason why it is useful or desirable or necessary to have it in admiralty, and the Court might well provide, might well decide that neither within the history nor the proper scope of admiralty should airplane accidents of this sort be held to be within admiralty jurisdiction.

MR. CHIEF JUSTICE BURGER: Mr. Bostwick, we'll enlarge your time a little here; you'll have five minutes.

REBUTTAL ARGUMENT OF PHILLIP D. BOSTWICK, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. BOSTWICK: Thank you very much, Your Honor. I'll be very brief.

With regard to a few of the questions concerning the facts and the allegations of contributory negligence, I just would like to clear up that in an unsworn statement the Air Traffic Controller did say that he said to the pilots: "It looks like a million birds", or words to that effect. However, there is no tape recording in this case from the tower, for an unknown reason, and it is undisputed that the

pilots did not acknowledge hearing that transmission and asked for a further clearance for takeoff, and it is uncontradicted that on the second clearance the Air Traffic Controller simply said, "Cleared for takeoff", without any reference to the birds at all. And I think it is clear beyond doubt, under the regulations, that the Air Traffic Controllers do have the power to hold aircraft on the runway when there are dangers on the duty runway.

Now, with regard to the legal points raised by the Solicitor General, I would just simply state that it is true there are no decisions by this Court concerning aircraft crashes in navigable waters. As the judge pointed out in the dissenting opinion, there are, however, about thirty years' worth of decisions in the lower federal courts concerning this very point, both under the Death on the High seas Act, the personal injury cases, property damage cases, cases within the general maritime law, under the general maritime law within the territorial navigable waters. Without exception, every one of those cases holds that the tort claims arising out of the crash of an airplane in navigable waters is cognizable in admiralty.

The case in the court below is the only case, to my knowledge, other than Judge Van Dusen's decision, which was reversed in Weinstein, holding that such a crash is not cognizable in admiralty.

Therefore, I know that this Court is aware of that line of precedent. I also know that it is conceivable this Court could now enunciate a totally new rule, without regard to those lower court decisions.

QUESTION: But isn't it wholly consistent with the cases that hold that if you fall off -- if you're knocked off a dock into navigable waters that it's not an admiralty case?

MR. BOSTWICK: Isn't the court below's opinion wholly consistent with those, you say?

QUESTION: No, --

MR. BOSTWICK: I'm sorry.

QUESTION: No, isn't what the United States is urging here consistent with that?

MR. BOSTWICK: Well, I don't believe so, Your Honor. It seems to me that the United States has virtually conceded, the government has virtually conceded the conflit between --

QUESTION: Well, isn't Cleveland's position, the City of Cleveland's position is wholly consistent with the wharf cases?

MR. BOSTWICK: Cleveland's position is that the wharf cases control. And we would urge that, because of the very playing of games, which was referred to by the Solicitor General, and the very complexity and the need to have pre-litigation concerning jurisdictional questions and questions of which substantive law is applicable, that this

Court should not follow that rule. This Court should enunciate a rule such as found in the Federal Rules of Civil Procedure, to reach the just, speedy, and inexpensive determination of the litigation on the merits, that there should be a rule which determines these questions of jurisdiction in applicable substantive law, without regard to metaphysical phrases such as where causes of action arise, where torts occur, where the impact occurs; these -- this language, which is found in the longshoremen and harbor workers' compensation cases, we say, has no place in the future of aviation and space activities, and we would rest primarily on the decisions of the Third Circuit in Weinstein, and on the dissenting court judge in this case.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Bostwick.

Thank you, Mr. Solicitor General.

The case is submitted.

[Whereupon, at 1:58 o'clock, p.m., the case in the above-entitled matter was submitted.]