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Personal Injury and Wrongful Death--Application of Maritime Law Principles to Inland Waterways and Offshore Drilling Operations--A Review of Jurisdiction, Status Problems, and Remedies

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PERSONAL INJURY AND WRONGFUL DEATH—APPLICATION OF MARITIME LAW PRINCIPLES TO INLAND WATERWAYS AND OFFSHORE DRILLING OPERATIONS—A REVIEW OF JURISDICTION, STATUS PROBLEMS, AND REMEDIES†

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I. INTRODUCTION

In the last two decades, the inland waters of the United States have been the locus of a tremendous increase in recreational boating, swimming, and water-skiing. During the same period the offshore oil industry has grown at an astounding rate. This increase in maritime traffic, coupled with the development of many new man-made lakes, has resulted in an inevitable increase in accidents and personal injuries on our inland waterways. Many of these inland mishaps give rise to lawsuits; and lawyers who may have had no experience with maritime law may suddenly find themselves caught in the tangled web of admiralty. Indeed, lawyers would do well to acquaint themselves with the rules of admiralty because the maritime jurisdiction of the federal courts has been greatly extended since our Constitution was first written. As one author phrased it,

> The silver oar, long the historic symbol of admiralty practice . . . would hardly have been recognized fifteen years ago in a federal court in Nevada, Wyoming, or any of the other inland states not bordering on the Great Lakes or the Mississippi River. . . . [T]he admiralty law has found its way upstream and is becoming an important field of law in all the districts of the federal judiciary.[1]

† Section IV of this paper appears in 13 ARK. LAW. 180 (1979).

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1. McCaughan, *Federal Maritime Jurisdiction Over Inland Intrastate Lakes*, 26 WASH. & LEE L. REV. 1 (1969).

This article endeavors to assist in determining whether a given case involving inland waters or offshore drilling operations is within the admiralty jurisdiction of the federal courts, the choice of courts in which suit may be filed, and the substantive law which governs when a case is in admiralty.

II. HISTORICAL BACKGROUND

Before discussing jurisdiction and substantive law, it is necessary to examine briefly the history of the extension of admiralty jurisdiction in the United States, since an understanding of that history is essential to an understanding of admiralty law today.

The scope of the judicial power of the United States is limited by Article III of the Constitution of the United States. The federal courts may entertain only those cases enumerated in Article III over which they have been given jurisdiction by an act of Congress. While Congress cannot grant the federal courts the power to hear cases not enumerated in Article III, it need not grant all the power which Article III allows.[2]

Article III of the Constitution of the United States extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."[3] The Congress implemented this constitutional grant of authority in section 9 of the Judiciary Act of 1789 and that provision was carried over into 28 U.S.C. § 1333 which now provides:

> The District Courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.[4]

Thus, the admiralty power of the federal courts extends to any case of admiralty or maritime jurisdiction with no jurisdictional requirement of an amount in controversy. While the reasons for this grant of power are not readily discernible, the great federal interest in promoting the commercial shipping industry of an infant nation and the need for a uniform law to apply to that industry may explain it.[5]

2. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 273 (1809).
3. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1333(1) (1976).
4. 28 U.S.C. § 1333(1) (1976).
5. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 1-10 (2d ed. 1975).

The framers of the Constitution granted the federal courts the power to hear cases of admiralty or maritime jurisdiction. The exact meaning and scope of those words have troubled American lawyers and judges since the dawn of our country's history. The question with which our courts have struggled for 200 years is, just what cases are included in the constitutional grant of admiralty jurisdiction.[6]

The first attempt to define an actionable maritime case was in *DeLovio v. Boit*,[7] decided in 1815, in which Justice Story said that admiralty jurisdiction "comprehends all maritime contracts, torts and injuries."[8] The term "maritime" was not clearly defined until ten years later when the United States Supreme Court decided *The Steam-Boat Thomas Jefferson*.[9] In *The Thomas Jefferson* the Court defined "maritime" as "the sea" or "waters within the ebb and flow of the tide," and established that this was the "prescribed limit" beyond which admiralty "was not at liberty to transcend."[10] Thus, the Court held, admiralty jurisdiction did not extend to matters arising out of navigation on inland waters, but was instead limited by the ebb and flow of the tide. The reason given by the Court for this restriction of jurisdiction was that this was the understanding in England and America at the time the Constitution was adopted.

This restrictive interpretation of the constitutional grant of admiralty jurisdiction survived until 1851 when the Supreme Court considered the landmark case of *The Propeller Genesee Chief v. Fitzhugh*,[11] involving a collision between two vessels on Lake Ontario. In considering the issue of jurisdiction, to which the objection lodged was that there is no tide in the Great Lakes, the Court observed,

> there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. . . . If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same.[12]

6. *See* Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925); G. GILMORE & C. BLACK, *supra* note 5, §§ 1-9 (2d ed. 1975).
7. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776).
8. *Id.* at 444.
9. 23 U.S. (10 Wheat.) 428 (1825).
10. *Id.* at 429.
11. 53 U.S. (12 How.) 233 (1851).
12. *Id.* at 238.

The Court described *The Thomas Jefferson* as an "erroneous decision,"[13] explaining that at the time the Constitution was written "tidewater" and "navigable water" meant the same thing in England, where there was no navigable stream beyond the ebb and flow of the tide, as in the thirteen original states, where the far greater part of the navigable waters were tide waters. Thus the Court upheld admiralty jurisdiction over the Great Lakes and the waters connecting them, concluding that "there can be no reason for admiralty power over a public tidewater, which does not apply with equal force to any other public water used for commercial purposes and foreign trade."[14] In upholding jurisdiction in *The Genesee Chief* the Court extended admiralty jurisdiction to inland waterways and announced that the new test for jurisdiction would henceforth be the navigability of the waterway. Indeed, today it is safe to say,

> the admiralty jurisdiction . . . extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject-matter of the suit is confined to one state.[15]

III. NAVIGABILITY—THE LOCALITY RULE AND MARITIME FLAVOR

In *The Plymouth*,[16] the United States Supreme Court laid down the rule that

> [t]he jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.[17]

Although this rule has been modified by statute,[18] the "locality" test, that the wrong must occur on navigable waters, remains the crucial test of admiralty tort jurisdiction.

The term "navigable waters" was defined by the Supreme Court in

13. *Id.* at 239.
14. *Id.* at 241.
15. G. GILMORE & C. BLACK, *supra* note 5, §§ 1-11 (2d ed. 1975).
16. 70 U.S. (3 Wall.) 20 (1865).
17. *Id.* at 36.
18. 46 U.S.C. § 740 (1970).

The Daniel Ball[19] as waters which are navigable in fact. The Court said,

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[20]

In addition to being navigable in fact, a waterway, to be subject to admiralty jurisdiction, must also be a navigable water of the United States as opposed to a navigable water of a state. Navigable waters of the United States must, by definition, form "in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[21]

A. *Navigability in Fact*

In applying the test of navigability in fact, the courts look to the capability of use by the public for transportation and commerce rather than the extent and manner of that use.[22] Thus it is enough for navigability that a stream can sustain commerce even if it is not in fact used in commerce. The mere fact, however, that a small boat can be made to float on a waterway is not enough to render it navigable in fact.[23] The waterway must be "capable in its natural state of being used for purposes of commerce."[24] Otherwise it is not navigable in fact and thus not navigable in law. An example of an inland body of water that will be held non-navigable is one of which the only possible use is fishing and recreation, which has no outlet, and does not act as a channel of commerce between states or to and from foreign countries.[25]

Limited navigation may be an insufficient basis for depriving a

19. 77 U.S. (10 Wall.) 557 (1870).
20. *Id.* at 563.
21. *Id.*
22. 87 U.S. (20 Wall.) 430 (1874).
23. Leovy v. United States, 177 U.S. 621, 633 (1900). Even a rowboat, skiff, or canoe may support admiralty jurisdiction for the "navigable in fact" portion of the test. The waterway, however, must be a highway for interstate or foreign commerce. G. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 34-35 (1939).
24. The Montello, 87 U.S. (20 Wall.) 430, 441 (1874).
25. *In re* River Queen, 275 F. Supp. 403 (W.D. Ark. 1967).

waterway of navigable status, however. In *United States v. Holt Bank*[26] the inland river in question was not frequently navigated because there was limited trade and travel in the vicinity. Because it was possible to operate a motorboat on the river, however, the Supreme Court held it to be a navigable waterway and within admiralty jurisdiction. Also, the fact that occasional difficulties may be encountered in navigating an inland waterway, such as the necessity to portage around falls or rapids, does not preclude a finding of navigability.[27] Nor does the fact that artificial obstructions have been placed on a waterway preclude its navigability, provided it could sustain commerce in its natural state.[28] The fact that a canal is privately owned is irrevelant in determining admiralty jurisdiction. If in fact it supports interstate commerce, it will be held navigable and within admiralty jurisdiction.[29] Finally, just because an inland waterway is once declared to be non-navigable does not mean that it can never be ruled navigable. If improvements constructed on the waterway make it navigable in fact, it will be held to be navigable for purposes of admiralty jurisdiction, despite a previous holding of non-navigability.[30]

B. *Landlocked Inland Waterways*

It is now fairly well established that certain landlocked inland lakes fall outside the scope of admiralty jurisdiction. In conformity with the rule announced in the *The Daniel Ball*, the courts will hold an inland lake to be non-navigable if it is landlocked, located wholly within one state, and not connected with any other navigable water so as to constitute part of a navigation system over which interstate and foreign commerce can flow.[31]

If the inland lake is used or is susceptible of being used as "an artery of commerce"[32] between two states, or a state and a foreign

26. 270 U.S. 49 (1926).
27. *Id.*
28. Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); Madole v. Johnson, 241 F. Supp. 379 (W.D. La. 1965).
29. Dow Chemical Co. v. Dixie Carriers, Inc., 463 F.2d 120 (5th Cir. 1972); United States v. Kaiser Aetna, 408 F. Supp. 42 (D. Hawaii 1976); Dagger v. U.S.N.S. Sands, 287 F. Supp. 939 (S.D. W. Va. 1968); Guilbeau v. Jalcon Seaboard Drilling Co., 215 F. Supp. 909 (E.D. La. 1963).
30. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
31. Oseredzuk v. Warner Co., 354 F. Supp. 453 (E.D. Pa. 1972); *In re* Builders Supply Co., 287 F. Supp. 807 (N.D. Iowa 1968); Doran v. Lee, 287 F. Supp. 807 (W.D. Pa. 1968); Marine Office v. Manion, 241 F. Supp. 621 (D. Mass. 1965); Shogru v. Lewis, 225 F. Supp. 741 (W.D. Pa. 1964).
32. Adams v. Mont. Power Co., 528 F.2d 437, 439 (9th Cir. 1975).

country, it will be held to be navigable, though this is unlikely where inland landlocked waters are concerned.

A leading case on this issue is *Adams v. Montana Power Co.*,[33] which involved a death occurring on the Missouri River at a point obstructed by a dam on each side. The court in *Adams* defined "commerce" as used in this context to mean "activities related to the business of shipping,"[34] and held this waterway to be non-navigable despite the presence of many small pleasure craft. The court reasoned that the purpose behind the grant of admiralty jurisdiction was a strong federal interest in the protection and promotion of the shipping industry, and that this purpose did not justify extending admiralty jurisdiction to an inland waterway traversed only by pleasure craft, on which no commercial shipping occurred or was likely to occur.[35]

The few cases which have considered the problem have held that artificial obstructions which render a body of water non-navigable do not prevent the waterway from being regarded as navigable if it would in fact be navigable in its natural state.[36] In *Madole v. Johnson*[37] the court was faced with an obstruction, a dam built upon the Ouachita River, which formed the lake upon which the accident involved in the case occurred. The court found the Ouachita River to be navigable in its natural state and held that the fact that it was artificially rendered non-navigable would not deprive the court of admiralty jurisdiction. No case has yet considered the question of admiralty jurisdiction over a formerly navigable body of water rendered non-navigable by natural and not artificial causes. In *Oseredzuk v. Warner Co.*,[38] however, a federal district court rejected the argument that a man-made lake, completely landlocked and completely within Pennsylvania, was subject to admiralty jurisdiction because it could be connected to an interstate commerce system by removing part of the narrow strip between it and a second lake and the Delaware River. The court rejected this concept of future navigability and held that admiralty jurisdiction must be determined at the time of loss.

33. 528 F.2d 437 (9th Cir. 1975).
34. *Id.* at 439.
35. *Id.* at 440.
36. Economy Light & Power Co. v. United States, 256 U.S. 113, 118 (1921).
37. 241 F. Supp. 379 (W.D. La. 1965).
38. 354 F. Supp. 453 (E.D. Pa. 1972).

C. *Aviation Cases*

The strict locality rule, which has for so long been the determining factor in deciding whether or not admiralty jurisdiction exists, led to the inclusion within that jurisdiction of cases involving airplane crashes and navigable waters. The first such case holding an airplane crash to be within admiralty jurisdiction was *Weinstein v. Eastern Air Lines, Inc.*,[39] decided by the United States Court of Appeals for the Third Circuit. *Weinstein* involved the crash of a plane, on a flight from Boston to Philadelphia, in Boston Harbor. The court adopted the strict locality rule and rejected the notion that some kind of maritime nexus was required in addition to locality. Since the waters of Boston Harbor were navigable, the court followed the locality rule and upheld admiralty jurisdiction. The court stated that "[i]f the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required."[40]

Following the United States Supreme Court denial of certiorari in *Weinstein*,[41] the decision was followed in at least four subsequent cases.[42] Thus the law appeared settled, despite early dicta calling for the application of a locality plus maritime connection test:[43] Locality alone was enough to invoke admiralty jurisdiction. Then, in 1972, the Supreme Court handed down its decision in *Executive Jet Aviation, Inc. v. City of Cleveland*.[44] A jet aircraft, taking off from Burke Lakefront Airport in Cleveland, Ohio, struck a flock of seagulls, lost power, crashed, and sank into the navigable waters of Lake Erie. The plaintiffs filed suit in admiralty and the district court dismissed for want of jurisdiction on the basis that the alleged negligence, the failure to keep the runway free of birds, occurred over land when the birds disabled the plane's engines. The district court also held that there must be a

39. 316 F.2d 758 (3d Cir. 1963).
40. *Id.* at 761.
41. 375 U.S. 940 (1963).
42. Scott v. Eastern Airlines, Inc., 399 F.2d 14 (3d Cir. 1968); Hornsby v. Fishmeal Co., 285 F. Supp. 990 (W.D. La. 1968); Harris v. United Airlines, Inc., 275 F. Supp. 431 (S.D. Iowa 1967); Rapp v. Eastern Airlines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967).
43. McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961).
44. 409 U.S. 249 (1972). *See* Note, *The Other Half of* Executive Jet: *The New Rationality in Admiralty Jurisdiction*, 57 TEX. L. REV. 977 (1979) for a recent discussion of current developments in this field. *See also* Eldoux v. Petroleum Helicopters, Inc., 609 F.2d 824 (5th Cir. 1980) where the court held that the crash of the decedent's helicopter, while it was being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity which is necessary to invoke admiralty jurisdiction.

relationship between the wrong and some maritime activity on navigable waters. The Sixth Circuit affirmed on the ground that "the alleged tort . . . occurred on land before the aircraft reached Lake Erie. . . ."[45]

The Supreme Court reviewed the historical test of maritime jurisdiction, noting some of the borderline cases which demonstrated the problems created by the strict locality test of admiralty jurisdiction. The Court concluded that it had "never explicitly held that maritime locality is the sole test of admiralty tort jurisdiction."[46] The Court went on to conclude that admiralty jurisdiction over an airplane negligence case does not exist merely because the tort occurs on or over navigable waters.

> It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.[47]

Applying this test to the case before it, the Court held that a significant relationship between the fall of a land-based airplane flying almost exclusively over land within the continental United States and traditional maritime activity involving navigation and commerce on navigable waters was lacking. Thus no federal admiralty jurisdiction existed.

In *Executive Jet*, the Supreme Court adopted the locality plus maritime connection test for admiralty jurisdiction. Only time will tell, however, whether the holding of that case is limited to aviation cases, or whether the Court has established a blanket rule governing any case brought in admiralty.[48] It is now clear that the mere fact that an airplane crashes on inland waters is no longer enough to sustain admiralty jurisdiction. It will probably be very difficult to establish a maritime connection in such cases since airplanes are almost always land-based and flying between two points in the continental United States.[49]

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45. 448 F.2d 151, 154 (6th Cir. 1971).
46. 409 U.S. 249, 258 (1972).
47. *Id.* at 268.
48. Calamari, *The Wake of Executive Jet—A Major Wave Or A Minor Ripple*, 4 MAR. LAW. 52 (1979).
49. Uniformity problems associated with the terms "significant relationship" and "traditional maritime activity" may arise in applying *Executive Jet* to other aviation tort cases. As Baer has stated:

> Whatever absurdities the use of location as the sole test of admiralty jurisdiction created, once it is determined that the test has occurred in or on navigable waters, the existence of

The lower court cases decided since *Executive Jet* seem to reflect this notion. In *Teachey v. United States*[50] the United States District Court for the Middle District of Florida dismissed the case for want of admiralty jurisdiction, despite the fact that a Coast Guard helicopter which had just conducted a rescue mission in the Gulf of Mexico was involved. The helicopter crashed in navigable waters while en route from Key West to St. Petersburg—two land bases within the continental United States. Citing *Executive Jet*, the court reasoned that the rescue mission had ended when the helicopter landed at Key West and that from that point it was merely transporting its passenger from one land base to another, an act which did not constitute a function traditionally performed by vessels. Thus, there was no maritime connection and no admiralty jurisdiction. One other district court has also denied admiralty jurisdiction over the crash of a plane en route from Atlantic City, New Jersey to Block Island, New York because no traditional maritime activity could be found. In *American Home Assurance Co. v. United States*, the mere fact that the wrong took place over navigable waters was again insufficient.[51]

There have been, however, several aviation cases in which the plaintiff was able to overcome the requirement of a maritime nexus. In *Higginbotham v. Mobil Oil Corp.*[52] the defendant's helicopter crashed into the Gulf of Mexico. The helicopter was being used by the defendant to transport its employees to the site of offshore drilling operations being conducted by the defendant. The district court sustained admiralty jurisdiction, holding that at the time of the accident, "[the helicopter] was performing the ordinary function of a crewboat"[53] and was thus engaged in a traditional maritime activity which satisfied the maritime nexus requirement of *Executive Jet*.

In *Roberts v. United States*[54] and *Hammill v. Olympic Airways, S.A.*[55] aviation torts were found to be cognizable by admiralty jurisdiction. In *Roberts*, an airplane crashed into navigable waters in Okinawa

admiralty jurisdiction was assured. But if location is not to be the sole test and the court must find that there was a significant relationship of the tort to a traditional maritime activity, certainty will not be assured. For reasonable justices may disagree as to what constitutes a traditional maritime activity.

H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 25-3, at 171-72 (2d ed. 1977 Cum. Supp.).

50. 363 F. Supp. 1197 (M.D. Fla. 1973).
51. 389 F. Supp. 657 (M.D. Pa. 1975).
52. 357 F. Supp. 1164 (W.D. La. 1973).
53. *Id.* at 1167.
54. 498 F.2d 520 (9th Cir. 1974).
55. 398 F. Supp. 829 (D.D.C. 1975).

while transporting cargo between Los Angeles and Viet Nam. The court concluded that maritime law applied, reasoning that "the transoceanic transportation of cargo is an activity which is readily analogized with 'traditional maritime activity'," [56] and that *Executive Jet* did not preclude admiralty jurisdiction in such a factual situation.

In *Hammill v. Olympic Airways, S.A.*, an American citizen was killed when an airplane flying between Corfu and Athens crashed into Voula Bay, one mile from the Athens airport. The district court upheld the application of admiralty jurisdiction, finding a sufficient maritime nexus to meet the *Executive Jet* standard.

> The airplane was on a flight across the Mediterranean Sea . . . and was serving a function that had traditionally been carried on by surface-going maritime vessels. It can, therefore, be said, and this Court so finds, that the 'wrong' which befell plaintiff's decedent occurred as a result of an activity which bore a significant relationship to traditional maritime activity.[57]

The most recent aviation tort case finding admiralty jurisdiction is *Hubschman v. Antilles Airboats, Inc.*,[58] which involved the crash of a seaplane in the Atlantic Ocean a few miles northeast of the Puerto Rico Island of Culebra. In concluding that admiralty jurisdiction attached on the facts before it, the court noted that the problems of seaplanes differ from those of conventional aircraft; that such problems are influenced by the marine nature of the runway used; and that flight over international waters involves special conveniences in using the admiralty forum. The court further noted that rather than being confronted with an occurrence in which an airplane crashed, and fortuitously ended up in the open sea, it was dealing with an incident in which a seaplane on a flight over international waters, having taken off over navigable waters, suffered total failure of both engines. Unlike the plane in *Executive Jet* which fell into the sea, the airplane in *Hubschman*, guided by its pilot, doing precisely what it was designed to do, landed on a body of water. The court concluded that one has to search far to find circumstances that more forcefully point to the existence of a maritime nexus.[59]

56. 498 F.2d 520, 524 (9th Cir. 1974).
57. *Id.* at 834.
58. 440 F. Supp. 828 (D.V.I. 1977).
59. *Id.* at 840.

IV. PLEASURE BOATS, SWIMMERS, AND WATER-SKIERS—RECREATIONAL ACCIDENTS ON NAVIGABLE INLAND WATERS

In recent years recreational watercraft, swimming, and water-skiing have experienced extraordinary growth. The 1975 statistical abstract of the United States indicates that in 1960, 295,000 recreational motorboats were sold in the United States and that by 1974 that figure had risen to 495,000. By 1974 statistics indicate that there were 7,595,000 recreational boat motors in use.[60] The great increase in recreation on our inland waters accounts for the increased number of accidents involving pleasure boats, swimmers, and water-skiiers. The question now is whether these accident victims may assert maritime claims or whether they are limited to state law claims.

A. *Pre-Executive Jet*

Prior to its decision in *Executive Jet*, the Supreme Court decided three cases dealing with pleasure craft in which it assumed jurisdiction without discussing that issue.[61] Thus it seemed that pleasure boat accidents on navigable waters were within admiralty jurisdiction. Since *Executive Jet*, however, the question of jurisdiction over pleasure boats, swimmers, and water-skiiers has become unclear. The lower courts have not reached agreement in either their results or reasoning.

B. *Pleasure Boats on Inland Waters*

The Fourth Circuit has considered two cases involving pleasure boats since *Executive Jet* was decided. The first, *Richards v. Blake Builders Supply*,[62] involved two pleasure boat accidents on navigable inland waters, one caused by the explosion of a motorboat being operated on Lake Gaston, a man-made lake partly in Virginia and partly in North Carolina, and the other involving the crash of a twenty-foot motorboat on Cape Fear River in North Carolina. Both inland waters were navigable and the craft in each case was in solely recreational use. In addition, there was no evidence of any substantial maritime commerce on either body of water.

The court, expressing its belief that such situations should lie

60. [1975] STATISTICAL ABSTRACT OF U.S. 215.
61. Levinson v. Deupree, 345 U.S. 648 (1953); Coryell v. Phipp, 317 U.S. 406 (1943); Just v. Chambers, 312 U.S. 383 (1941).
62. 528 F.2d 745 (4th Cir. 1975).

outside admiralty jurisdiction, yet concluded that both were within admiralty jurisdiction because *Executive Jet* was limited to airplane crash cases and had not overruled the settled jurisprudence of the Supreme Court prior to that case. Despite the absence of commercial shipping on these inland waters, the court found a maritime connection, the vessels in navigation, absent in the airplane crash in *Executive Jet*. These accidents were, therefore, within the rule announced in *Executive Jet*, bearing a sufficient nexus to traditional maritime concerns. Though firm in the belief that the historical foundation of federal admiralty jurisdiction did not justify extending that jurisdiction to cases involving private pleasure craft and that state courts should adjudicate such local matters, the court followed the settled rule that pleasure boat accidents on navigable waters are within admiralty jurisdiction.

The other Fourth Circuit case, *Lane v. United States*,[63] involved a crash between a pleasure craft and a sunken barge on an inland river. The court had no difficulty upholding jurisdiction over this case because "collisions between vessels in navigation and submerged hulks of wrecked vessels are a traditional concern of admiralty."[64] Thus the Fourth Circuit, while upholding jurisdiction over pleasure boat cases, has made it clear that a significant relationship to traditional admiralty concerns is required.

The Eighth and Ninth Circuits have viewed the maritime nexus requirement of *Executive Jet* in a more expansive manner. In *St. Hilaire Moye v. Henderson*,[65] a boating accident case on the navigable waters of the Arkansas River, the Eighth Circuit found that the locality plus test had been met merely by the operation of a vessel on navigable waters as "[t]he use of a waterborne vessel on navigable waters presents a case falling appropriately within the historical scope and design of the law of admiralty."[66] The Eighth Circuit thus places the emphasis on the operation of a boat, regardless of its size or activity, on navigable waters, viewing that as a traditional maritime activity justifying admiralty jurisdiction even if the vessel is not engaged in commerce, because its operation on navigable waters presents a potential danger to vessels which are engaged in commerce.

The Ninth Circuit, in *Adams v. Montana Power Company*,[67] re-

63. 529 F.2d 175 (4th Cir. 1975).
64. *Id.* at 180.
65. 496 F.2d 973 (8th Cir. 1974).
66. *Id.* at 979.
67. 528 F.2d 437 (9th Cir. 1975).

quired more than the operation of a boat on navigable waters before asserting admiralty jurisdiction. The court reasoned that since admiralty jurisdiction aimed at promoting the shipping industry through the development of a uniform body of law, there was no need to extend that jurisdiction to incidents occurring on bodies of water nontraversable by commercial vessels. If some obstruction in an otherwise navigable waterway "has the practical effect of eliminating commercial maritime activity, no federal interest is served by the exercise of admiralty jurisdiction over the events transpiring on that body of water."[68] The court pointed out that navigability under the commerce clause of the United States Constitution was not always sufficient for purposes of exercising admiralty jurisdiction. In *Chapman v. United States*,[69] the Seventh Circuit followed the reasoning of *Adams*, denying admiralty jurisdiction over another pleasure boat accident.

The Fifth Circuit requires more for maritime nexus than the mere operation of a vessel on navigable waters. In *Kelly v. Smith*,[70] a case involving gunfire from an island in the Mississippi River which wounded the man at the tiller of a fifteen-foot outboard motorboat, the court held that the fact that a vessel was involved to be only one factor in determining the existence of a substantial maritime relationship, the other factors being the function and role of the parties involved, the causation and type of injury, and traditional concepts of the role of admiralty law. Because the party injured in *Kelly* was the pilot, the person responsible for safe navigation of the vessel, and the vehicle was a boat, the court concluded that jurisdiction was present since the wounding of the pilot endangered maritime commerce.

The Fifth Circuit has also decided two cases resulting from accidents on a ferry. In *Byrd v. Napoleon Ave. Ferry*,[71] admiralty jurisdiction was sustained when a car careened off the ferry and into the river. In *Peytavin v. Government Employees Insurance Co.*,[72] the court held that a rear-end collision between two cars on a floating pontoon at a ferry landing did not invoke admiralty jurisdiction because no connection with maritime activity, other than the involvement of the pontoon, could be found. Neither the cause of the accident nor the injury (whiplash) had any maritime connection. *Byrd* was distinguished as having

68. *Id.* at 440.
69. 575 F.2d 147 (7th Cir. 1978).
70. 485 F.2d 520 (5th Cir. 1973).
71. 227 F.2d 958 (5th Cir. 1955).
72. 453 F.2d 1121 (5th Cir. 1972).

sufficient maritime connection because there the plaintiff was a passenger aboard a commercial ferry, rather than merely a passenger waiting for a ferry; and the negligence involved was that of a commercial ferry boat operator rather than that of the driver of a car.

The test announced by the Fifth Circuit in *Kelly* has been followed in at least four federal district court cases. Two of these decisions sustained jurisdiction: *Kayfetz v. Walker*,[73] a case involving a collision between two pleasure yachts in Long Island Sound, and *Gilmore v. Witschorek*,[74] a case involving a collision of two pleasure boats. In both cases the fact that vessels were involved in a collision resulting from improper navigation was the determinative factor. In one of the other cases adopting the *Kelly* test, *Clinton Board of Park Commissioners v. Claussen*,[75] the district court dismissed a suit arising out of the drowning of an eleven year-old boy in Joyce Slough, a navigable body of water connected to the Mississippi River, because no maritime connection could be found between shipping and commerce and a boy who fell from a flotation platform while fishing; the court viewed the case as a state wrongful death case that just happened to occur on navigable waters. In the last of these cases, *Richardson v. Foremost Insurance Co.*,[76] the court held that it did not have admiralty jurisdiction over the collision of two pleasure boats, one used for water-skiing and the other for pleasure fishing, neither of which had ever been involved in any commercial marine activities with no other relation to admiralty or commerce.

Three other recent district court cases deserve mention. In *King v. Harris-Joyner Co.*,[77] a 1974 case involving the explosion of a pleasure boat on Lake Gaston, a navigable lake, the court dismissed the suit for want of a maritime nexus, citing *Executive Jet*; while in *Brown v. United States*,[78] in which a man was killed when the mast of his pleasure boat struck a low power line strung across the Colorado River, a sufficient nexus was found. The court considered the power line an impediment to navigation. Hence the *Executive Jet* test was satisfied.

A district court of Tennessee, in *Roberts v. Grammer*,[79] relied heavily on *Executive Jet* to find that federal admiralty jurisdiction did

73. 404 F. Supp. 75 (D. Conn. 1975).
74. 411 F. Supp. 491 (E.D. Ill. 1976).
75. 410 F. Supp. 320 (S.D. Iowa 1976).
76. 470 F. Supp. 321 (M.D. La. 1979).
77. 384 F. Supp. 1231 (E.D. Va. 1974).
78. 403 F. Supp. 472 (C.D. Calif. 1975).
79. 432 F. Supp. 16 (E.D. Tenn. 1977).

not exist. In *Roberts*, two small non-commercial pleasure boats collided on a small landlocked lake in Tennessee. Finding a significant relation to maritime activity to be lacking, the court stated that the law of admiralty is specially designed for the shipping industry, not small pleasure boats, and that based on *Executive Jet*, a significant relationship to traditional maritime commerce is not present when two small non-commercial pleasure boats collide on a small landlocked lake wholly contained within the State of Tennessee. The court also noted that the states provide adequate remedies and procedures for settlement of disputes arising from local, intra-state, small-boat accidents with no connection with the maritime industry.[80]

In *Bendlin v. Virginia Electric and Power Co.*,[81] the court required the same maritime nexus as did the *Roberts* court, and accordingly refused to extend admiralty jurisdiction. However, in *Armour v. Gradler*,[82] where the facts were similar, the court held that admiralty jurisdiction did apply since the accident occurred aboard a vessel while it was on navigable waters.

Clearly then, lower courts will continue to render irreconcilable decisions regarding admiralty jurisdiction over pleasure boats until the Supreme Court creates a uniform test for the applicability of admiralty jurisdiction in these cases. Unless the Supreme Court speaks against including pleasure boat cases in admiralty, it appears that most lower federal courts will continue to exercise admiralty and maritime jurisdiction in these cases.

C. *Swimmers*

Despite the problems the courts have had with pleasure boats, they have had none with swimmers. This class of plaintiff is clearly outside admiralty jurisdiction, both before and after *Executive Jet*. Prior to *Executive Jet* the Sixth Circuit adopted the "locality plus" test in holding that a plaintiff injured from a dive off the side of a pier into a navigable lake could not sue in admiralty.[83] Following *Executive Jet*, in *Onley v. South Carolina Electric and Gas Co.*,[84] the Fourth Circuit found no nexus between traditional maritime activity and an injury to a person

80. *Id.* at 17-18.
81. 449 F. Supp. 934 (E.D. N.C. 1978).
82. 448 F. Supp. 741 (W.D. Pa. 1978).
83. Chapman v. City of Grosse Point Farms, 385 F.2d 962 (6th Cir. 1967).
84. 488 F.2d 758 (4th Cir. 1973); *see also* Rubin v. Power Authority, 356 F. Supp. 1169 (1973).

who dove from a dock into a navigable lake and struck a submerged boat ramp. Even control by the defendant of the water level of the lake was not enough to meet the requirements of *Executive Jet*.

One case has upheld admiralty jurisdiction in a suit against the United States Coast Guard. In *Kelly v. United States*,[85] the plaintiff claimed that the Coast Guard negligently failed to rescue a drowning victim who fell following the capsize of a pleasure boat in Lake Ontario. The court upheld admiralty jurisdiction, viewing the case not as a pleasure boat case but as one involving rescue operations on navigable waters, a category bearing a significant relationship to traditional maritime activity.

D. *Water-Skiers*

Prior to *Executive Jet*, cases involving water-skiers were held to invoke admiralty jurisdiction.[86] In 1973, however, in *Crosson v. Vance*,[87] an action brought by a water-skier against the operator of a towing motorboat for injuries suffered on Maryland navigable waters, the Fourth Circuit relied on *Executive Jet*, where the Supreme Court explicitly disapproved of extending jurisdiction to cases involving water-skiers, and held that "[a]dmiralty jurisdiction does not reach a claim for personal injury by a water-skier against the allegedly negligent operator of [a] tow-boat."[88] *Crosson* was followed by the district court for the Eastern District of Tennessee in *Webster v. Roberts*.[89] Likewise in *Jorsch v. Lebeau*,[90] an Illinois district court, in accord with the *Crosson* and *Webster* rationale, denied admiralty jurisdiction. That court reasoned that since the tortious conduct which caused the accident had no significant relationship to traditional maritime activities, there was no reason to try the case in admiralty.

V. Injured Parties and Remedies

Once a determination is made that admiralty jurisdiction exists over a particular case, the rights under the substantive law of admiralty, of those who suffer personal injuries on inland waters, is the next

85. 531 F.2d 1144 (2nd Cir. 1976).
86. Isaacson v. Jones, 216 F.2d 599 (9th Cir. 1954); Kaiser v. Travelers Ins. Co., 359 F. Supp. 90 (E.D.La. 1973); King v. Festerman, 214 F. Supp. 335 (E.D. Tenn. 1963).
87. 484 F.2d 840 (4th Cir. 1973).
88. *Id.* at 842.
89. 417 F. Supp. 346 (E.D. Tenn. 1976).
90. 449 F. Supp. 485 (N.D. Ill. 1978).

subject of inquiry. Those persons who could conceivably be injured on inland waterways may be divided into three groups: (a) seamen, (b) maritime workers, and (c) all others, including guests, water-skiers, swimmers and any other persons who do not have an employment relation.

A. *Seamen*

In 1903, in its landmark decision, *The Osceola*,[91] the United States Supreme Court held that a seaman could not recover from his employer for injuries caused by the negligence of a fellow crewman. In 1920 Congress overruled the Supreme Court by passing the Jones Act,[92] giving seamen a cause of action against their employers for the negligence of the vessel's officers and crew. The Jones Act specifically incorporates the provisions of the Federal Employers' Liability Act (FELA),[93] which gives a right to railroad employees to recover from their employers for the negligence of a fellow servant.

1. What is a vessel?

Offshore Co. v. Robison,[94] the frequently cited 1959 decision of the Fifth Circuit, set the parameters within which a seaman's status is determined. In order to have the special status of seaman an employee must have a more or less permanent attachment to his vessel, or perform substantially all his duties aboard the vessel, and perform duties which aid the vessel's mission or contribute to the function of the vessel or to its maintenance at sea or anchorage.[95] In addition, the worker must be employed aboard a vessel in navigation before he can be a seaman under the *Robison* test.

A vessel has been defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[96] This definition includes any vessel used as transportation, even for pleasure, provided it is on navigable water.[97]

91. 189 U.S. 158 (1903).
92. Merchant Marine Act of 1920, ch. 250, 41 Stat. 988, 1007 (1920). This provision is now codified at 46 U.S.C. § 688 (1976).
93. "[T]he common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. § 688 (1976). The rights and remedies available to railway employees are found in the Federal Employers' Liability Act. 45 U.S.C. §§ 51-60 (1976).
94. 266 F.2d 769 (5th Cir. 1959).
95. *Id.*
96. 1 U.S.C. § 3 (1976).
97. G. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 39 (1939).

Yet, it is important to remember that a vessel for purposes of The Jones Act is not necessarily a vessel for other purposes, such as for purposes of an insurance contract.[98] The requirement that the boat be in navigation effectively precludes those which are mothballed,[99] or which are undergoing extensive reconstruction[100] from coverage.

The Fifth Circuit, after consistently holding that all submersible drilling rigs, oil storage facilities, etc.[101] are vessels in navigation, has recently reversed its liberal attitude. In *Blanchard v. Engine and Gas Compression Service*,[102] the Fifth Circuit held that submerged barges, one of which had not been moved in twenty years, and which carried no navigation lights, equipment or lifesaving gear, and were not registered with the Coast Guard, were not vessels within the meaning of the Jones Act. "Mere flotation on water" was not enough to constitute a vessel in the court's opinion.[103]

The apparent trend begun by the Fifth Circuit in *Blanchard* towards a restrictive interpretation of the term "vessel" continued in the case of *Leonard v. Exxon Corp.*[104] in which the United States District Court for the Middle District of Louisiana held that a floating construction platform moved to the bank of the Mississippi River near Baton Rouge was not a vessel. The Fifth Circuit, in affirming, held that a floating device neither designed for navigation nor engaged in navigation at the time of the accident was, as a matter of law, not a vessel under the Jones Act.

The view expounded by cases such as *Blanchard* and *Leonard* appears to be the course which admiralty courts will take in the future, restricting workers injured on structures such as those involved in the *Blanchard* and *Leonard* cases to non-maritime remedies.[105]

98. West v. United States, 361 U.S. 118 (1959); Dresser Indus. v. Fidelity & Cas. Co., 580 F.2d 806 (5th Cir. 1978).

99. Roper v. United States, 368 U.S. 20 (1961); Hawn v. Am. S.S. Co., 107 F.2d 999 (2d Cir. 1939).

100. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Seneca Washed Gravel Corp. v. McManigal, 65 F.2d 77 (2d Cir. 1933); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966).

101. Hicks v. Ocean Drilling and Exploration Co., 512 F.2d 817 (5th Cir. 1975); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

102. 575 F.2d 1140 (5th Cir. 1978).

103. *Id.* at 1143.

104. 581 F.2d 522 (5th Cir. 1978).

105. It is to be observed that fixed platforms located on the Outer Continental Shelf are regarded as "artificial islands" and are governed by state law, as surrogate federal law, and the Longshoremen's and Harbor Workers' Compensation Act, rather than maritime law. Rodrique v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969); 43 U.S.C. § 1333(a) & (c).

2. Who are Seamen?

Robison did not end the search for a definition of the term seaman. It was, rather, the beginning. Since its decision in *Robison*, the Fifth Circuit has led the other admiralty courts in extending seaman's status to hairdressers,[106] musicians,[107] messmen,[108] horsemen,[109] bartenders,[110]actors,[111] and bargemates.[112] The courts have been very liberal in extending the protection of the Jones Act to all classes of maritime workers employed aboard vessels. Two extremely important decisions of the Fifth Circuit illustrate the court's liberal attitude in applying the Jones Act and in finding the elements of Jones Act status as they are set forth in *Robison*.

In *Davis v. Hill Engineering, Inc.*,[113] the Fifth Circuit extended the coverage of the Jones Act to a welder employed by Hill Engineering, Inc. The evidence revealed that the plaintiff was hired as a welder's helper to assist in the fabrication of pipe, the loading and unloading of fabricated structures onto a barge, and the assembly of the structures on platforms. The fabrication was done on the bank of the Intracoastal Canal near Houma, Louisiana. When the onshore phase of the operation was completed, the Hill employees, including the plaintiff, boarded the barges for the journey to the fixed platform in the Gulf of Mexico. On the trip the plaintiff helped to wash down the barge on which he was travelling and to secure the equipment and materials to the barge. He also welded two cracks in the deck of the barge at the request of the barge superintendent.

The Fifth Circuit concluded that the plaintiff was permanently assigned to the vessel in that he ate and slept on the vessel, assisted in loading and unloading it, and helped repair the vessel at the request of the barge superintendent thereby being subjected to the "hazards of the sea"[114] just as any ordinary member of the crew of the barge would be. The court further found that the plaintiff's duties contributed to the

106. Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165 (2d Cir. 1973).
107. The Sea Lark, 14 F.2d 201 (W.D. Wash. 1926).
108. Warren v. United States, 340 U.S. 523 (1951).
109. United States v. Atl. Transp. Co., 188 F. 42 (2d Cir. 1911), *cert. denied*, 223 U.S. 724 (1911).
110. The J.S. Warren, 175 F. 314 (S.D.N.Y. 1910).
111. *In re* Famous Players Lasky Corp., 30 F.2d 402 (S.D. Cal. 1929).
112. Potashnick-Badgett Dredging, Inc. v. Whitfield, 269 So.2d 36 (Fla. Dist. Ct. App. 1972).
113. 549 F.2d 314 (5th Cir. 1977).
114. *Id.* at 327.

mission of the barge, which it found to be a special purpose vessel used to transport men and equipment from one location to another.

The concept of seaman's status was further expanded by the Fifth Circuit in its decision in *Higginbotham v. Mobil Oil Corp.*[115] There the plaintiff's decedent, James Nation, was employed by Mobil on a fixed drilling platform. The evidence indicated that Nation had spent much of his time during the two years prior to his death working on submersible drilling vessels. The court emphatically stated that the situs of work is not determinative of Jones Act status. James Nation, during the two years prior to his death, had spent all but a small fraction of his time on submersible drilling rigs. He had been assigned to the fixed platform as a temporary replacement for another platform worker; and every indication was that his general pattern of employment would not have changed substantially in the future. The Fifth Circuit concluded that the undisputed evidence required a finding that Nation was a seaman despite intermittent temporary assignments to fixed platforms.[116]

A worker need not be connected with *one* vessel in order to meet the requirements necessary for Jones Act status. In *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*,[117] the Fifth Circuit stated that while the number of vessels involved might have some bearing on a jury determination of whether an individual is a seaman, it is settled that he may be a member of a crew of more than one vessel.[118]

Despite the *Davis* and *Higginbotham* decisions, not every worker injured on a vessel qualifies as a seaman. Persons only transitorily aboard a vessel, those who perform a substantial part of their duties on land and work aboard vessels only as an incident to their principal work, or those who deal irregularly with a number of vessels are not Jones Act seamen.[119]

On May 24, 1979, the United States Court of Appeals for the Fifth Circuit handed down a significant milestone among Jones Act status decisions. In that case, *Landry v. AMOCO Production Company*,[120] the plaintiff spent approximately seventy percent of her employment as a roustabout working aboard various barges. The jury found against her

115. 545 F.2d 422 (5th Cir. 1977).
116. *Id.* at 433.
117. 280 F.2d 523 (5th Cir. 1960).
118. *Id.* at 528.
119. Fazio v. Lykes Bros. S.S. Co., 567 F.2d 301 (5th Cir. 1978); Holland v. Allied Structural Steel Co., Inc., 539 F.2d 476 (5th Cir. 1976); Owens v. Diamond M Drilling Co., 487 F.2d 74 (5th Cir. 1973).
120. 595 F.2d 1070 (5th Cir. 1979).

on the seaman's status question, and the district court denied her motion for a judgment notwithstanding the verdict on this issue. The Fifth Circuit ruled that plaintiff was a seaman as a matter of law under the undisputed facts of the case and remanded the matter for a new trial.

Finally, it is important to note that a Jones Act employer need not be the vessel owner, and that the injury need not occur on the vessel in order to be compensable under the Jones Act.[121]

3. Maintenance and Cure

In addition to a Jones Act claim for negligence, a seaman has a claim for maintenance and cure, which includes wages till the end of the voyage, lodging, meals and medical expenses. The duty to pay maintenance and cure is implied from the contract of employment, and liability is imposed without fault. All that is required is that the injury or sickness manifest itself while the seaman is in the service of his ship.[122]

The obligation of maintenance and cure includes the duty to furnish the seaman with room and board. While the maintenance rate was eight dollars per day for many years,[123] the United States District Court for the Eastern District of Louisiana has recently issued an injunction requiring the payment of maintenance at the rate of fifteen dollars per day.[124] In two decisions by other divisions of that district, similar requested injunctions have been denied in holding that injunctive relief is not the proper remedy.[125] Arguably, summary judgment is a better alternative to injunctive relief for plaintiffs seeking an increase in maintenance prior to trial on the merits.

Cure is an obligation to provide medical treatment to the injured seaman. An employer can discharge this duty by providing the injured seaman with entrance to a public health hospital. The obligation is owed until the seaman reaches maximum cure; and an employer can be held liable for penalties and attorneys fees for refusing arbitrarily to

121. Vincent v. Harvey Well Serv., 441 F.2d 146 (5th Cir. 1971); Webb v. Dresser Indus., 536 F.2d 603 (5th Cir. 1976).

122. *See generally* NORRIS, MARITIME PERSONAL INJURIES § 13 (1966). In addition to such a claim, a seaman may sue under maritime law for unseaworthiness.

123. Varady v. D & D Catering Serv., Inc., 450 F. Supp. 182 (E.D. La. 1978); Murphy v. S.S. Panoceanic Faith, 241 F. Supp. 540 (E.D. La. 1965).

124. Robinson v. Plimsoll Marine, Inc., No. 77-1636 (E.D. La., Oct. 12, 1978).

125. Billiot v. Toups Marine Transp., Inc., No. 78-295, (E.D. La., March 2, 1979); Carline v. Capital Marine Supply, Inc., No. 77-3422 (E.D. La., March 1, 1979).

pay maintenance and cure.[126]

Finally, a plaintiff in a Jones Act case is entitled to a jury trial by statute; and under the Supreme Court's decision in *Fitzgerald v. U.S. Lines*,[127] he can join claims under the Jones Act with unseaworthiness, and maintenance and cure claims and have all three tried before a jury so long as he is mindful that there is no right to a jury trial under the general maritime law absent a special situation such as that existing in *Fitzgerald*.

B. *Maritime Workers*

Those persons who work on navigable waters or near navigable waters and who are not classified as seamen may be maritime workers covered by the Longshoremen's and Harbor Workers' Compensation Act,[128] (LHWCA). This class of worker includes longshoremen, harbor workers, shipbuilders, ship repairmen and others within the meaning of the Act.[129] Those persons who are covered by the Act have the right to sue for compensation[130] from their employer, which is exclusive except for a third party action for negligence.[131] To be covered by the LHWCA a worker must have situs and status. He must be engaged in maritime employment, which is determined by his function at the time of his injury; and the injury must take place on navigable waters or any terminal, wharf, pier or drydock, or other adjoining area customarily used in loading or unloading vessels.[132] An employee who is not a seaman and who does not qualify under the LHWCA, will be covered under the applicable state compensation act.[133]

C. *Others*

A person injured on inland waters who fails to qualify as a Jones Act seaman and who does not come under either the LHWCA or any state compensation act and whose case is within admiralty jurisdiction, will have an action for negligence under the general maritime law. The

126. Vaughan v. Atkinson, 369 U.S. 527 (1962).
127. Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).
128. 33 U.S.C. §§ 901-950 (1976).
129. *Id.* § 902(3).
130. *Id.* §§ 903-904.
131. *Id.* §§ 905(b), 933.
132. *Id.* § 902.
133. *But see* Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978). An exclusive remedy provision in a state workmen's compensation law cannot be applied if the case is within the admiralty and maritime jurisdiction of the United States. *Id.*

duty of care under the general maritime law, as announced by the Supreme Court in *Kermarec v. Compagnie Generale Transatlantique*,[134] is to act as a reasonably prudent person, to act with reasonable care, without distinction between invitees and licensees. While a higher standard of care is probably due a paying passenger, such a classification is not a status in the maritime law. The warranty of seaworthiness is owed only to those with the status of seaman; thus no other person may base an action for personal injury on the unseaworthiness of the vessel.[135]

VI. Death Actions on Inland Waters

A. *Seamen*

The Jones Act gives a wrongful death and a survival cause of action to certain beneficiaries for the wrongful death of a seaman. Both actions are based on negligence and limited to recovery of pecuniary loss. The Death on the High Seas Act[136] (DOHSA) provides a remedy for wrongful death resulting from negligence or unseaworthiness if the death occurs on the high seas more than one marine league from the shore. Like the Jones Act, DOHSA only permits recovery for pecuniary loss, and excludes recovery for nonpecuniary damages such as loss of society.

Prior to 1970, general maritime law did not provide a remedy for wrongful death, regardless of whether that death occurred on the high seas or within the territorial waters of a state. Admiralty courts were therefore required to turn to state wrongful death statutes to provide relief from the harsh rule of *The Harrisburg*,[137] a decision of the United States Supreme Court which refused to recognize a maritime wrongful death remedy. In 1970, however, the Court overruled *The Harrisburg* and held, in *Moragne v. States Marine Lines*,[138] that maritime law did provide a remedy for wrongful death, although the Court left open such issues as the appropriate damages under the new cause of action and which beneficiaries are entitled to recover those damages. *Sea-Land Services, Inc. v. Gaudet*[139] picked up where *Moragne* left off and for the first time revealed the elements of damage recoverable under

134. 358 U.S. 625 (1959).
135. *Id.* at 632, n.9.
136. 46 U.S.C. §§ 761-768 (1976).
137. 119 U.S. 199 (1886).
138. 398 U.S. 375 (1970).
139. 414 U.S. 573 (1974).

the new *Moragne* cause of action. In *Gaudet*, the Supreme Court went beyond DOHSA and held that nonpecuniary loss, such as loss of society, was recoverable under the *Moragne* death action, noting that such damages were recoverable under most state wrongful death statutes and that Congress, by specifically limiting DOHSA to deaths occurring on the high seas, did not preclude the availability of nonpecuniary items of damage under the new federal maritime death remedy.

At first the United States Court of Appeals for the Fifth Circuit interpreted *Gaudet* very broadly as eliminating any restriction on the recovery of nonpecuniary loss. In *Landry v. Two R Drilling Company*,[140] the plaintiff asserted both a Jones Act claim and a claim for unseaworthiness as the result of the death of her husband, which occurred within the territorial waters of Louisiana. The Fifth Circuit held, despite the Jones Act's limitation on the recovery of nonpecuniary damages, that *Gaudet* damages were proper, stating,

> [w]hile the . . . proper measure of damages when the recovery is solely under the Jones Act has not been decided by this Circuit, where, as here, there is liability under both a Jones Act claim and a general maritime [law] claim for unseaworthiness, this Court has recognized *Gaudet* damages as proper.[141]

Further, in *Law v. Sea Drilling Corp.*,[142] the Fifth Circuit boldly discarded DOHSA as a remedy, holding that *Moragne* and the elements of damage recoverable thereunder, as announced in *Gaudet*, applied on the high seas as well as within state territorial waters:

> It is time that the dead hand of *The Harrisburg*—whether in the courts or on the elbow of the congressional draftsmen of DOHSA—follow the rest of the hulk to an honorable rest in the briny deep.
>
> No longer does one need . . . DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters—any navigable waters—and it can be enforced in any court.[143]

The broad reading of *Gaudet* begun by the Fifth Circuit in *Landry* and culminating in *Law*, was considerably limited in *Mobil Oil Corp. v. Higginbotham*,[144] in which several widows sought recovery for the

140. 511 F.2d 138 (5th Cir. 1975).
141. *Id.* at 143.
142. 523 F.2d 793 (5th Cir. 1975).
143. *Id.* at 798.
144. 436 U.S. 618 (1978).

deaths of their husbands, which occurred in a helicopter crash on the high seas, under DOHSA and maritime law. The Supreme Court distinguished the case from *Gaudet* on the ground that the death in *Gaudet* had occurred within territorial waters and not on the high seas, holding that there could be no award to the plaintiffs for loss of society because of express congressional refusal to allow the recovery of nonpecuniary loss under DOHSA. The lack of uniformity as to the measure of damages recoverable did not trouble the Supreme Court, which stated, "It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute."[145]

The Fifth Circuit, when presented with its next difficult case in which the damages question was posed, took the word of the Supreme Court literally, stating "We have no authority to change the course set for us, no matter what star we would have chosen to steer by were we plotting the voyage."[146] Judge Alvin B. Rubin penned this statement in *Ivy v. Security Barge Lines, Inc.*,[147] which involved the death of a Jones Act seaman within state territorial waters. At trial the jury returned a verdict against the Jones Act employer for negligence, but specifically found the defendant's vessel seaworthy. The trial court, despite the jury determination of no liability under the maritime law unseaworthiness claim, and the Jones Act's court-interpreted limitation on damages to pecuniary loss,[148] allowed recovery of damages for loss of society. The Fifth Circuit, relying exclusively on *Higginbotham*, reversed, holding that the award of nonpecuniary damages could not stand:

> To allow the recovery of nonpecuniary damages under the Jones Act merely because the accident occurred within territorial waters would not only be inconsistent with . . . years of firmly established legal precedent, but would create two separate Jones Act remedies, each applicable only within its own geographical sphere. It would be anomalous indeed if we interpreted the Supreme Court's opinion to encourage the creation of needless disuniformity based solely on the place of the accident, bringing the law full circle from the days prior to *Moragne*.[149]

The Fifth Circuit's decision in *Ivy* ignores the Supreme Court's

145. *Id.* at 624 (footnote omitted).
146. Ivy v. Security Barge Lines, Inc., 585 F.2d 732, 738 (5th Cir. 1978) (footnote omitted).
147. 585 F.2d 732 (5th Cir. 1978).
148. Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913).
149. 585 F.2d at 738.

blunt statement in *Higginbotham* that a different measure of damages may be available depending upon whether the death occurred within or beyond the three mile line. The Fifth Circuit's decision in *Ivy* appears at first to prohibit the recovery of nonpecuniary damages in all Jones Act cases, whether the death occurs beyond three miles or within three miles. A close examination of *Ivy*, however, reveals that the court was concerned exclusively with the measure of damages recoverable when liability is predicated *only* on the Jones Act, and not on any general maritime law theory, such as unseaworthiness. Thus, the survivors of a Jones Act seaman killed within three miles as a result of negligence *and* unseaworthiness will presumably be entitled to recover nonpecuniary damages under the Fifth Circuit's decision in *Landry*, which was quoted, but not overruled, in *Ivy*.[150]

B. *Maritime Workers*

The LHWCA[151] provides a remedy for the death of a worker covered by the Act.[152] If, however, a third party tort suit exists, *Moragne* would give a cause of action for wrongful death and survival based on negligence under the general maritime law.

C. *Others*

All non-seamen who are not covered by either the LHWCA or a state compensation act will have an action for wrongful death and survival based on negligence under *Moragne* with the full range of benefits announced in *Sea-Land Services v. Gaudet*.[153] These persons have no action based on unseaworthiness, however. While it appears that *Moragne* will be held to include a survival action, in the event that it is ultimately held not to do so, the decedent's beneficiaries can argue that state law supplements maritime law and that a state survival statute may be used in conjunction with the *Moragne* wrongful death remedy.

150. *Ivy* has been reheard by the Fifth Circuit, but the decision has not yet been handed down. Oral argument was heard June 4, 1979. For a discussion of *Ivy* v. *Security Barge Lines, Inc.*, in relation to *Moragne*, *Gaudet* and *Higginbotham*, see *Ivy v. Security Barge Lines, Inc.: The Fifth Circuit Continues Higginbotham's Retreat*, 25 LOY. L. REV. 215 (1979).

151. Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (1927).

152. 33 U.S.C. § 909 (1927).

153. 414 U.S. 573 (1974).

VII. THE "SAVING TO SUITORS" CLAUSE[154]

Although 28 U.S.C. § 1331 gives the federal courts admiralty jurisdiction exclusive of the state courts, it also saves to suitors "all other remedies" to which they are entitled. This clause means that a plaintiff, as long as he is bringing his suit *in personam*, has a choice of forum. He may sue in admiralty in federal court or in state court. However, if the plaintiff is asserting an *in rem* claim against the vessel, based on a maritime lien, he does not have a choice of forum because that type suit is exclusively within the admiralty jurisdiction of the federal courts. A plaintiff who brings his *in personam* claim in state court or on the law side of federal court can have a jury in admiralty court. In any event, no matter which court the plaintiff chooses, the law that will be applied in a case within admiralty jurisdiction will be substantive admiralty law.[155]

VIII. LIMITATION OF LIABILITY

In 1884, in an attempt to aid and promote the shipping industry, Congress passed the Limited Liability Act which allows the owner of a vessel to limit his liability to the value of the damaged vessel,[156] using the value of the vessel the moment after the accident as a proper measure. The limitation action by a vessel owner can be brought only in federal admiralty court,[157] and may be maintained by the vessel owner or raised by him as a defense in his answer if a suit has been filed against him. Once the limitation proceeding begins, the vessel owner may be sued in no other court,[158] and all claimants are given a period of time in which to file their claims in admiralty court. The vessel owner must commence the limitation proceedings within six months after receipt of a written notice of a claim, and must post a bond equal to the value of the vessel when he files for limitation of liability. Finally, a vessel owner will be entitled to limit his liability only if he can prove

154. *See generally*, M. NORRIS, MARITIME PERSONAL INJURIES 84 (3d ed. 1966); D. ROBERTSON, ADMIRALTY AND FEDERALISM at 123-25 & 271-83 (1970).

155. *See* Stansbury v. Hover, 366 So. 2d 918 (La. Ct. App. 1978), in which the Louisiana Court of Appeal for the First Circuit held that, while the court must apply federal admiralty substantive law to a maritime personal injury case brought in state court, Louisiana law could be applied to supplement the maritime law where state law does not contravene maritime law.

156. Limited Liability Act, C. 121, 23 Stat. 53, 57-58 (1884). This provision is now codified at 46 U.S.C. § 189 (1976).

157. Langnes v. Green, 282 U.S. 531 (1931).

158. Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969).

that the liability was incurred without his privity or knowledge as to the negligence or condition which caused the liability.

"Vessel" as used in the limitation of Liability Act applies to all vessels; and it appears settled that the owners of commercial vessels on inland waters may take advantage of the Limitation of Liability Act.[159]

IX. CONCLUSION

Rapidly increasing marine operations such as offshore drilling, transportation to offshore worksites, and aquatic recreation in our society have not surprisingly caused the law of admiralty to extend to areas never before affected. Litigation of a maritime accident involves unique jurisdictional concerns, status problems, and remedies. The summary of the law contained in this article should assist the practitioner in endeavoring to identify and sort the issues in such a case.

159. *In re* Theisen, 349 F. Supp. 737 (E.D.N.Y. 1972); *In re* Klarman, 295 F. Supp. 1021 (D. Conn. 1968); Harolds, *Limitation of Liability and Its Application to Pleasure Boats*, 37 TEMP. L.Q. 423, 428 (1964), concludes that the Supreme Court has not squarely passed on the issue of the applicability of the limitations statute to pleasure boats.