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Grubart v. Great Lakes Dredge & Dock Company: A Reasonable Conclusion to the Debate on Admiralty Tort Jurisdiction

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Note

Grubart v. Great Lakes Dredge & Dock Company: A Reasonable Conclusion to the Debate on Admiralty Tort Jurisdiction

I. Introduction

In August and September, 1991, Great Lakes Dredge & Dock Company ("Great Lakes") replaced the pilings of a pier that supported the Kinzie Street Bridge pursuant to a contract with the City of Chicago.[1] The pilings kept ships from bumping the pier.[2] Great Lakes carried out the procedure with the use of two barges; one carried replacement pilings and the other a crane to pull out the old pilings and place the new ones.[3] The barge carrying the crane was anchored to the river-bed with long metal legs, or "spuds".[4]

On April 13, 1992, 250 million gallons of water broke through the walls of a tunnel under the Chicago River and flooded the basements of buildings in downtown Chicago.[5] The city shut off electrical power in the flooded area, evacuated numerous buildings, including City Hall, the Board of Trade and the Sears Tower, and lowered the level of the river.[6] On April 15, 1992, the downtown area was declared a federal disaster

1. *See* Grubart v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043, 1046 (1995).

2. *See id.*

3. *See id.*

4. *See id.* "Spuds" are defined as "[a] sharp-pointed vertical post or pile, commonly one of four, which can be forced by a tackle or by power through a socket in a floating or land dredge or scow to anchor it." WEBSTER'S NEW WORLD DICTIONARY 2243 (2d ed. 1988).

5. *See* Michael Abramowitz, *Thousands Evacuated as Flooding Swamps Chicago's Financial District,* WASH. POST, Apr. 14, 1992, at A3.

6. *See id.*

area by President Bush.[7] A week later, damage estimates had passed the $1 billion mark and fifteen buildings remained closed.[8]

The flood's effect went well beyond physical damage to the city. For example, six days after the flood, Great Lakes, the largest dredging contractor in the United States,[9] announced that it would refrain from making its initial public offering until the issues of liability were settled.[10] Two city engineers were fired, the Acting Transportation Commissioner was forced to resign, and others were reprimanded.[11] In addition, the incident added fuel to the ongoing debate concerning the privatization of city functions.[12]

Three days after the flood, the first lawsuit was filed.[13] In the suit, Great Lakes and the City of Chicago were named as defendants.[14] The suits[15] were filed in state court.[16] The victims alleged that the City of Chicago had not properly maintained the tunnel and that Great Lakes had negligently weakened the tunnel in the course of replacing the pilings.[17] Great Lakes then brought suit in federal court seeking protection under the Limitation of Vessel Owner's Liability Act[18] as well as requesting indemnity and contribution from the city.[19] James B. Grubart, Inc. and the city moved to dismiss the fed-

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7. *See* Thomas M. Burton, *Many Chicago Buildings Still Flooded; Power Expected to Remain Off for Days*, WALL ST. J., Apr. 16, 1992, at A12 [hereinafter *Chicago Buildings*].

8. *See* Jeff Bailery & Thomas M. Burton, *Flood Damage in Chicago Seen Over $1 Billion*, WALL ST. J., Apr. 20, 1992, at A3.

9. *See Great Lakes Dredge Puts Initial Offering on Hold*, WALL ST. J., Apr. 20, 1992, at A7.

10. *See id.*

11. *See* Michael Abramowitz, *2 Chicago Officials Ousted; Daley Moves Against 5 Others Over Flood*, WASH. POST, Apr. 23, 1992, at A1.

12. *See* Thomas F. Roeser, *Chicago Flood's Lesson*, WALL ST. J., May 28, 1992, at A20. "What citizens are learning is that while there has been some private-sector responsibility for the flood crisis, government failure worsened the problem." *Id.*

13. *See Chicago Buildings*, *supra* note 7, at A12.

14. *See id.*

15. Many victims of the flood brought suit. *See Grubart*, 115 S. Ct. at 1047.

16. *See id.*

17. *See id.*

18. 46 U.S.C. §§ 181-96 (1994).

19. *See* Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225, 226 (7th Cir. 1993).

eral suits for lack of admiralty jurisdiction.[20] The District Court for the Northern District of Illinois granted the motion, but the Court of Appeals for the Seventh Circuit reversed.[21] The United States Supreme Court affirmed the Seventh Circuit and remanded the case.[22]

The issue before the Court was whether a federal court has admiralty tort jurisdiction when a party alleges that a dredging company weakened an underground tunnel, causing the tunnel to give way and resulting in a flood.[23] Before answering the main question, however, the Court first had to determine what jurisdictional test to use. The Court noted that the traditional test for admiralty tort jurisdiction was simply a matter of determining whether or not the alleged tort occurred on navigable water.[24] The Court also noted that it had modified this test in a series of cases which began limiting admiralty jurisdiction by requiring a certain amount of connection between traditional maritime activity and the events giving rise to the lawsuit in addition to the location requirement.[25] However, because the Court, in each of these relevant cases, neither mandated nor precluded the use of any particular test whenever admiralty tort jurisdiction was at issue, the circuit courts failed to adopt a uniform test for admiralty tort jurisdiction.[26] In *Grubart,* the Court forsook the various circuit court tests and mandated the use of its test for all admiralty tort jurisdiction questions.[27] As set forth by the *Grubart* Court, this test requires satisfying both conditions of locality and a certain maritime connection.[28] As will be seen, both aspects of this test have roots in the history of the debate over admiralty tort jurisdiction.

The Court's decision in *Grubart* has resulted in uniformity amongst the circuits.[29] However, as the existence of the concur-

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20. *See id.*
21. *See id.* at 225.
22. *See Grubart,* 115 S. Ct. at 1055.
23. *See id.* at 1046.
24. *See id.* at 1047.
25. *See id.* at 1048.
26. *See infra* notes 166-80, 220-22, 224-31 and accompanying text.
27. *Grubart,* 115 S. Ct. at 1055.
28. *Id.* at 1048.
29. *See* Coats v. Penrod Drilling Co., 61 F.3d 1113, 1118 (5th Cir. 1995) (finding that *Grubart* overrules prior Fifth Circuit case law); White v. United States, 53 F.3d 43 (4th Cir. 1995) (using *Grubart* test); Neely v. Club Med Management Serv-

ring opinion demonstrates, this case will not end the debate on which test is most appropriate. Indeed, although admiralty law has contained "nexus" or "location plus" tests for admiralty tort jurisdiction for a number of years, detractors of the new method have voiced their opinion continually. But the arguments of these detractors overcome neither the soundness of the *Grubart* decision nor the soundness of the reasons for having a nexus test for admiralty tort jurisdiction.

Part II of this Note will discuss the development of admiralty tort jurisdiction, particularly in the United States. This section will highlight the problematic aspects and the criticisms levied against strict application of the locality test. Part III of this Note will set forth the facts and decision of the *Grubart* case. Part IV of this Note will analyze the Court's decision in light of the history of admiralty tort jurisdiction. Part V will conclude that the Court's decision was inevitable and proper, but not sufficient to stem the criticisms levied by those yearning for a return to the strict application of the locality test.

II. Background

A. *Admiralty Jurisdiction Generally*

Jurisdiction is the "power of the court to decide a matter in controversy . . . ."[30] But, as with admiralty law, jurisdiction may also implicate a certain body of law. Thus, depending on the matter at hand, jurisdiction itself may be the most important issue for a litigant. For example, in the noted case, Great Lakes sued to limit its liability to the value of the vessels involved pursuant to the Limitation of Vessel Owner's Liability Act.[31] Since the decision in *Grubart*, the city of Chicago has already settled seventeen of over sixty-five claims for $36 million[32] while Great

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ices, Inc., 63 F.3d 166, 179 (3d Cir. 1995) (using *Grubart* test); Tokyo Marine and Fire Ins. Co. Ltd. v. Perez, 893 F. Supp. 132, 134 (D.P.R. 1995) (citing *Grubart* for admiralty tort jurisdiction test); McClenahan v. Paradise Cruises, Ltd., 888 F. Supp. 120, 123 (D. Haw. 1995) (finding that *Grubart* overrules factor approach of prior caselaw).

30. BLACK'S LAW DICTIONARY 853 (6th ed. 1991).

31. *See Grubart*, 115 S. Ct. at 1047.

32. *See* Mary A. Mitchell, *$36 Million Payout Settles Loop Flood Suit Against City*, CHICAGO SUN-TIMES, Aug. 12, 1995, at 3.

Lakes may be liable for only $633,940—the value of the vessels involved.[33]

Admiralty procedure is governed generally by the Federal Rules of Civil Procedure[34] ("FRCP") that also provide supplemental rules for certain admiralty procedures.[35] In addition to the supplemental rules, the FRCP contains special provisions for admiralty cases. For example, in Rule 38 entitled "Jury Trial of Right," section (e) states that the rule "shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim. . . ."[36] Admiralty procedure is governed by other special rules established by both statute and caselaw.[37]

Substantively, admiralty cases are governed by both federal statutes and federal common law based on the traditional principles of maritime law.[38] For example, the Death on the High Seas Act[39] creates a cause of action for death "on the high seas beyond a marine league from the shore" for the benefit of a limited group.[40] However, the proposition that a vessel and its owners "are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage continued[,]"[41] though a settled principle of admiralty law, has no statutory authority. It is a proposition "of ancient vintage,"[42] and appears to derive from some of the early European Codes.[43] Getting to this body of procedural and substantive law, like the

33. *See* Michael Briggs, *City Suffers Legal Setback In Battle Over Loop Flood*, CHICAGO SUN-TIMES, Feb. 23, 1995, at 14.

34. Rule 1 states that the FRCP governs "the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty." FED. R. CIV. P. 1.

35. FED. R. CIV. P. SUP. R. A-F.

36. FED. R. CIV. P. 38(e). *See* FED. R. CIV. P. 14 (governing third party action) and FED. R. CIV. P. 82 (limiting the rules of venue in admiralty claims).

37. *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 3-2 (1987).

38. *See id.*

39. 46 U.S.C. §§ 761-68 (1994).

40. *Id.* § 761.

41. *The Osceola*, 189 U.S. 158, 175 (1902).

42. SCHOENBAUM, *supra* note 37, § 5-2.

43. *See The Osceola*, 189 U.S. at 169-72 (investigating ancient sea codes of Europe to find support for proposition that vessels and owners liable for sickness of seaman while in service of ship).

admiralty law itself, is a subject rooted in the history of commerce.

Maritime law originated in the traditional practices of the ancient Mediterranean traders.[44] These customs formed the basis from which the Early European Codes developed.[45] These Codes "purported not so much to enact law for any territory as to state what was conceived already to be law by custom of the sea."[46] But the closeness of trade and shipping in the principles of admiralty law blurred the distinction between trade, which includes activities having no connection to maritime commerce, and shipping, resulting in admiralty's "pre-empting" territorial law.[47] In England, the extensive jurisdiction of the admiralty was systematically limited. In 1389, Parliament limited admiralty jurisdiction to things "done upon the sea."[48] The common law courts narrowly construed this language and limited admiralty jurisdiction nearly to the literal meaning of the words "done upon the sea."[49] By the time of the American Revolution, admiralty jurisdiction in both England and America was limited to a "very inconsiderable class of cases."[50]

The United States Constitution extended federal judicial power "to all Cases of admiralty and maritime Jurisdiction",[51] and Congress gave federal district courts "original jurisdiction" over admiralty cases.[52] This grant of jurisdiction did not affect the traditional test for admiralty jurisdiction. In 1813, Justice Story, then a circuit court judge, stated that "[i]n regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act."[53] In *De Lovio v. Boit*,[54] Justice Story clarified his view by holding that admiralty tort jurisdiction is limited to "injuries and offences,

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44. *See* GRANT GILMORE & CHARLES L. BLACK JR., THE LAW OF ADMIRALTY, § 1-3 (1975).

45. These include the Tablets of Amalfi, the *Llibre del Consolat de mar* of Barcelona, the Laws of Wisby and the Rules of Oleron. *See id.*

46. *See id.*

47. *See id.*

48. EDGAR T. FELL, RECENT PROBLEMS IN ADMIRALTY JURISDICTION 13 (1922).

49. GILMORE & BLACK, *supra* note 44, § 1-4.

50. FELL, *supra* note 48, at 15.

51. U.S. CONST. art. III, § 2.

52. 28 U.S.C. § 1333(1) (1994).

53. Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813).

54. 7 F. Cas. 418 (C.C.D. Mass. 1815).

upon the high sea, and in ports as far as the tide ebbs and flows."[55] The United States Supreme Court explicitly adopted this test in *The Philadelphia, Wilmington and Baltimore Railroad Co. v. The Philadelphia and Havre de Grace Steam Tow-Boat Co.*[56]

B. *The Locality Test in the United States Until 1972*

Soon after its adoption in the United States, the locality test began to change. The "tidal rule," limiting admiralty jurisdiction to the ebb and flow of the tide,[57] was overturned in *The Propeller Genesee Chief v. Fitzhugh*[58] and made dependent upon whether or not the water involved was navigable.[59] The change in rules was initiated primarily because of a change in circumstances. The United States Supreme Court noted that the original rule was adopted "when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of present day."[60] Further, because commerce on the lakes and navigable waters in the West would not be subject to admiralty jurisdiction under the original test, the Court determined that there would not be equal rights among the states—a basis upon which the union is formed.[61]

The location of the *injury* was also an issue. In *The Plymouth*,[62] a vessel anchored near a wharf caught fire due to the negligence of those in charge of the vessels.[63] A suit in admiralty was commenced, but was dismissed by the District Court for the Northern District of Illinois for lack of jurisdiction.[64] The Court of Appeals for the Seventh Circuit affirmed.[65] The argu-

55. *Id.* at 441. This opinion is one of the classic opinions written on admiralty jurisdiction. Justice Story gives a detailed account of the history of admiralty jurisdiction in reaching his conclusion.

56. 64 U.S. 209, 215 (1859) (holding that admiralty tort jurisdiction "depends entirely on locality").

57. *De Lovio*, 7 F. Cas. at 441.

58. 53 U.S. 443 (1851).

59. *See id.* at 457.

60. *Id.* at 456.

61. *See id.* at 454.

62. 70 U.S. 20 (1865).

63. *Id.*

64. *See id.*

65. *See id.*

ment was made to the Supreme Court that this was a "mixed case"—the tort being committed partly on land and partly on water.[66] The Court, however, noted that mixed cases subject to admiralty jurisdiction were those cases brought in contract where admirality jurisdiction was also dependent on the subject matter of the contract.[67] Since tort cases have only a "remote resemblance" to contract cases, the Court refused to analyze this as a "mixed case."[68] Another argument made in support of jurisdiction was that since the vessel which spread the fire to the wharf was a maritime vessel, the tort was maritime in nature.[69] The Court found this argument misdirected, for admiralty tort jurisdiction "does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters."[70] The Court held that in order to properly assert admiralty jurisdiction, both the wrong and injury must be upon the high seas or navigable water.[71]

Though the Court in *The Plymouth*, by requiring locality on navigable water for both the wrong and injury, appeared to settle the question of admiralty tort jurisdiction, it actually gave rise to the first set of cases foreshadowing the move away from a strict application of the locality test. In *The Blackheath*,[72] the Court held that injury to a buoy by a vessel gave rise to admiralty jurisdiction because the buoy was a government aid to navigation—traditionally within the purview of admiralty law—and was only technically land through its connection to the bottom of the river.[73] In essence, the Court expanded the reach of admiralty jurisdiction without corrupting the jurisdictional test by defining the factual setting in such a way that the test would be satisfied. The Court subsequently found jurisdiction lacking when the injury was to structures dealing with

66. *Id.* at 34.
67. *See id.*
68. *See The Plymouth*, 70 U.S. at 34-35.
69. *See id.* at 35.
70. *Id.*
71. *See id.*
72. 195 U.S. 361 (1904).
73. *Id.* at 367.

land based commerce.[74] What is important about these cases is that the Court looked to the incident to determine if there was a traditional connection to admiralty law.[75] This concern over whether the facts have a traditional connection to admiralty law prompted future changes in admiralty tort jurisdiction.[76] The judiciary, however, did not question the utility of the locality test until it was faced with the inequities and absurdities of its application.

1. *Inequities and Absurdities*

In *T. Smith & Sons v. Taylor*,[77] a longshoreman was struck by a sling and thrown into the water while working on a wharf.[78] The longshoreman's widow brought suit under the state's workmen's compensation statute and won.[79] The defendant claimed the case was within admiralty, and therefore, application of the state law was unconstitutional.[80] The Supreme Court held that because "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land"—being the place where the longshoreman was struck—there was no admiralty jurisdiction.[81] Seven years later, the Court held for admiralty jurisdiction in a case with very similar facts. In *Minnie v. Port Huron Terminal*,[82] a longshoreman was struck by a crane and thrown onto a wharf while working on a vessel.[83] In affirming the Louisiana Supreme Court's holding that federal law applied, the United States Supreme Court held that the maritime character of the cause of action was not altered merely because the injured party was

74. *See* Martin v. West, 222 U.S. 191 (1911) (holding tollbridge a land structure "used as an aid to commerce on land", and therefore no admiralty jurisdiction); Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co., 208 U.S. 316 (1908) (holding bridge, dock, protective pilings and pier all structures connected to commerce on land, not aids to navigation, and therefore no admiralty jurisdiction).

75. *See supra* notes 72-74 and accompanying text.

76. *See infra* note 108 and accompanying text.

77. 276 U.S. 179 (1928).

78. *Id.* at 181. The accident resulted in the longshoreman's death. *See id.*

79. *See id.* at 180.

80. *See id.* at 181.

81. *Id.* at 182.

82. 295 U.S. 647 (1935).

83. *Id.*

thrown onto land.[84] The Court found this result perfectly consistent with the reasoning of *T. Smith & Sons v. Taylor*:

> If, when the blow from a swinging crane knocks a longshoreman from the dock into the water, the cause of action arises on the land, it must follow, upon the same reasoning, that when he is struck upon the vessel and the blow throws him upon the dock the cause of action arises on the vessel.[85]

Application of the locality test resulted in different holdings despite the fact that the cases in question had exactly the same character and almost exactly the same facts.

The Extension of Admiralty Jurisdiction Act[86] ("Extension Act"), enacted in 1948, was designed to remedy this confusing line of cases.[87] The Extension Act extended admiralty jurisdiction to all cases of injury caused by a vessel,[88] "notwithstanding that such damage or injury be done or consummated on land."[89] The limitation on admiralty jurisdiction that *The Plymouth* holding created was effectively overruled by the Extension Act. However, the Extension Act did not rectify all the absurd results of the application of the locality test as set forth by the court in *The Plymouth*.

Strict application of the locality test resulted in the extension of admiralty jurisdiction to cases having almost no connection with maritime commerce—the object of admiralty law. In *King v. Testerman*,[90] a water-skier brought an admiralty suit against the pilot of the boat for operating the boat in a negligent manner.[91] Noting that the incident involved the operation of a boat on navigable water, the district court felt compelled to find admiralty jurisdiction.[92] In *Davis v. City of Jacksonville*

84. *See id.* at 648.

85. *Minnie*, 295 U.S. at 649.

86. 46 U.S.C. § 740 (1994).

87. *See Grubart*, 115 S. Ct. at 1047-48.

88. The limitation that the injury be caused by a vessel includes damage "proximately caused by the vessel or its master or crew." THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 3-4, at 71 (1987). The question of when a ship or its crew proximately causes damage has generated its own confusing line of cases. *See generally id.*

89. 46 U.S.C. § 740.

90. 214 F. Supp. 335 (E.D. Tenn. 1963).

91. *Id.* at 335-36.

92. *See id.* at 336.

Beach,[93] a bather was injured by a surfboard, and subsequently sued the surfboard rider.[94] The district court held that the case fell within the admiralty, noting that "any tort whatever, occurring on the high seas or navigable waters, is within the admiralty jurisdiction."[95] Other courts, however, refused to strictly apply the locality test.

2. *Movement Away from Locality Alone*

Beginning in the 1960s, courts began to apply the locality test in a less stringent manner. These courts generally noted that the Supreme Court, in *Atlantic Transport Co. v. Imbrovek*,[96] refused to hold that the locality test was the sole test for admiralty jurisdiction.[97] In *McGuire v. City of New York*,[98] the court avoided strict application of the locality test, finding that the locality test is "a rule of exclusion or limitation . . . ."[99] Thus, locality "is merely a *prima facie* test of admiralty jurisdiction."[100] Noting that admiralty law is tied to commerce, the court held that admiralty jurisdiction extends to "all matters relating to the business of the sea . . . ."[101] In *McGuire*, a plaintiff sued the city for injuries she sustained while swimming.[102] Since the tort had no connection with the business of the sea, and because the tort was indistinguishable from an injury sustained on a beach,[103] the court refused to extend admiralty jurisdiction to the case.[104]

McGuire gave birth to a line of cases which rejected strict application of the locality test. In *Chapman v. City of Grosse*

93. 251 F. Supp. 327 (M.D. Fla. 1965).
94. *Id.* at 328.
95. *Id.*
96. 234 U.S. 52 (1914).
97. *Id.* at 61. The Court held that *"[e]ven if it be assumed* that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive . . . the district court, from any point of view, had jurisdiction." *Id.* at 61 (emphasis added). The Court, therefore, left room for speculation as to whether or not locality may operate merely as a threshold showing.
98. 192 F. Supp. 866 (S.D.N.Y. 1961).
99. *Id.* at 869.
100. *Id.* at 870.
101. *Id.* at 871.
102. *Id.* at 866.
103. *See McGuire*, 192 F. Supp. at 871.
104. *See id.* at 872.

Pointe Farms,[105] the plaintiff was injured when diving into eighteen inches of water off a pier that was part of recreational facilities owned by the city.[106] The Court of Appeals for the Sixth Circuit held that because there was no connection to maritime service, navigation or commerce there was no admiralty jurisdiction.[107] In its decision, the court held that the locality test should "be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land," but "that jurisdiction may not be based solely on the locality criterion."[108]

In *O'Connor & Co. v. City of Pascagoula*,[109] the plaintiff, engaged in shipping explosives, alleged that the defendant city illegally interfered with its loading explosives aboard ship.[110] The District Court for the Southern District of Mississippi, citing *Chapman*, held that a "locality plus" test, which required a showing of a connection to maritime service, navigation or commerce, was required to find admiralty jurisdiction.[111] In *Peytavin v. Government Employees Insurance Co.*,[112] the plaintiff allegedly sustained whiplash injuries when another car hit his while he was parked on a floating pontoon waiting to buy a ticket for a ferry.[113] After tracking the history of the locality test,[114] the Court of Appeals for the Fifth Circuit found no admiralty jurisdiction, stating that neither the activity in which the parties engaged nor the injuries had a substantial connection with either maritime activities or interests.[115] These cases all reflect an attempt to develop a test for admiralty tort jurisdiction more closely related to the primary subject of admiralty law—maritime commerce.

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105. 385 F.2d 962 (6th Cir. 1967).

106. *Id.* at 963.

107. *See id.* at 966.

108. *Id. See also* Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969) (discussing *Chapman* and need for connection between wrong and maritime activity).

109. 304 F. Supp. 681 (S.D. Miss. 1969).

110. *Id.* at 682.

111. *See id.*

112. 453 F.2d 1121 (5th Cir. 1972).

113. *Id.* at 1122.

114. *See id.* at 1122-25. The court focused its historical analysis on the "extension of land" doctrine, citing some of the same cases that are cited in this Note. *See id.* at 1125.

115. *See id.* at 1127.

These cases also reflect the criticisms and doubts expressed by commentators as to the value of a strict locality test.[116] These concerns refer to the test's reliance on location and not with the "real and practical relation with the business and commerce of the sea."[117] The desired link to maritime commerce is reasonable due to the practical basis for a distinct admiralty law:

> Whether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all. It is hard to think of any better reason for having this jurisdiction than its aptness for providing a special-industry court for the maritime industry.[118]

Further, admiralty law is "not necessarily well suited for general non-maritime application,"[119] and may even have a detrimental effect on the just outcome of a matter having little or no connection to maritime commerce.[120] Indeed, it is hard to dispute such reasoning: why should the test for reaching a specialized body of law be so expansive as to encompass cases which that body of law was not designed to govern?

C. *Admiralty Jurisdiction and Aviation*

The development of air travel and commerce created difficult problems for admiralty tort jurisdiction. Air travel and aircraft did not fit easily into the confines of admiralty tort jurisdiction. It is not surprising, then, that aviation cases were the ones in which the Supreme Court took the first steps away from strict application of the locality test.[121]

In the earliest cases dealing with aircraft and admiralty jurisdiction the courts addressed the question of whether an aircraft is a maritime vessel. In *The Crawford Bros. No. 2 Foss v.*

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116. *See generally* Charles L. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COL. L. REV. 259 (1950); GILMORE & BLACK, *supra* note 44; E. BENEDICT, THE LAW OF AMERICAN ADMIRALTY, § 127, at 349-52 (1940); 7A J. MOORE, FEDERAL PRACTICE, ADMIRALTY .325(3) & (5); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 S. CT. REV. 158 (1960) (advocating a more active Supreme Court to formulate more cohesive maritime law).

117. Black, *supra* note 116, at 264.

118. GILMORE & BLACK, *supra* note 44, § 1-10, at 30.

119. MOORE, *supra* note 116, § .325 (5).

120. *See id.*

121. *See infra* note 160 and accompanying text.

The Crawford Bros. No 2,[122] the District Court for the Western District of Washington refused to extend admiralty jurisdiction to enforce a maritime lien against an airplane.[123] The court noted that maritime liens can only exist on vessels engaged in navigation on navigable waters,[124] and held that in the absence of legislation conferring jurisdiction over this "new" form of commerce, the issue should be decided by the trial courts.[125] In *United States v. Northwest Air Service*,[126] the Court of Appeals for the Ninth Circuit needed to determine the priority of liens on a seaplane.[127] The United States filed an *in rem* action against a seaplane to recover penalties for the owner's violation of federal laws.[128] The plane was seized while in a hangar on shore.[129] Northwest Air Service ("Northwest") intervened, claiming a lien for making repairs on the seaplane, the engine of which was still in Northwest's custody.[130] Northwest maintained that the seaplane was a vessel within maritime jurisdiction, and therefore that its lien was superior.[131] The court held that while a seaplane afloat on navigable water may be a vessel within admiralty, it does not retain such status while on land, in a hangar undergoing repairs and without an engine.[132]

However, in *Reinhardt v. Newport Flying Service Corp.*,[133] Justice Cardozo, then a Judge on the Court of Appeals of New York, found that aircraft were subject to admiralty jurisdiction while afloat.[134] Cardozo first noted that the term "vessel" was interpreted broadly and included rafts, scows, dredges, temporarily sunken drillboats and "anything upon the water where

122. 215 F. 269 (W.D. Wash. 1914).

123. *Id.* at 271.

124. *See id.*

125. *See id.*

126. 80 F.2d 804 (9th Cir. 1935).

127. *Id.* at 805.

128. *See id.* at 804.

129. *See id.*

130. *See id.*

131. *See id.* at 805.

132. *See id.* at 805. *See also* Dollins v. Pan-American Grace Airways, Inc., 27 F. Supp. 487 (S.D.N.Y. 1939) (holding airship not vessel within liability limiting statutes); Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939) (holding airship not vessel within liability limiting statutes).

133. 232 N.Y. 115, 133 N.E. 371 (1921).

134. *Id.* at 119, 133 N.E. at 372.

movement is predominant rather than fixity or permanence."[135] Next, he declared that seaplanes have a primary function of traveling through air and an auxiliary function of traveling in water.[136] While on the water, the plane is subject to admiralty jurisdiction.[137] Cardozo defended this bifurcation:

> It is no reason for the exclusion of jurisdiction when the mischief is traceable to the function that is auxiliary and secondary. Collision does not cease to be collision and a peril of the sea because the structure is amphibious. We cannot even say that the chance that the peril will be encountered is so remote as to be negligible. The records of the Navy Department show that there have been times, in transatlantic flights, when planes, abandoning the air, moved for days upon the water.[138]

Also giving rise to the question of whether admiralty law should apply were the crashes of airplanes into water. Many cases held that the Death on the High Seas Act[139] conferred admiralty jurisdiction over suits commenced due to plane crashes in navigable waters.[140] However, in cases where the Death on

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135. *Id.* at 118, 133 N.E. at 372.

136. *See id.*

137. *See id.*

138. *Reinhardt*, 232 N.Y. at 118-19, 133 N.E. at 372. This bifurcated view of seaplanes is still used, even after the test for admiralty jurisdiction changed, to require some connection to traditional maritime activity as well as maritime locality. In *Hark v. Antilles Airboats, Inc.*, 355 F. Supp. 683 (D.V.I. 1973), a passenger on a seaplane claimed injury when the seaplane ditched in a harbor shortly after takeoff due to engine trouble. *Id.* at 684. The District Court for the District of the Virgin Islands, citing *Reinhardt*, noted that when floating, a seaplane is subject to admiralty jurisdiction because it is a vessel. *See id.* at 685. This case, however, was problematic, for the plane had not yet completed takeoff, though it was two hundred feet above the sea when it had engine trouble. *See id.* The court ultimately held that this incident was subject to admiralty jurisdiction. *See id.* at 686. The court noted that the concerns faced when taking off and landing seaplanes are "marine" in nature, unlike the concerns faced by their conventional counterparts, because the flight was over international waters and "it seems desirable to treat ship and aircraft accidents in the same manner, insofar as possible." *Id.* at 686. *See* Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 841 (D.V.I. 1977) (holding admiralty jurisdiction attaches where injury was sustained either while in seaplane on water or while outside seaplane in water).

139. 46 U.S.C. §§ 761-68 (1994).

140. *See* Trihey v. Transocean Air Lines, 255 F.2d 824 (9th Cir. 1958) (noting Death on the High Seas Act grants exclusive jurisdiction to admiralty); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955) (limiting jurisdiction under Death on the High Seas Act to admiralty).

the High Seas Act does not apply,[141] admiralty jurisdiction must have some independent justification if it is to be found. In *Weinstein v. Eastern Airlines, Inc.*,[142] a plane crashed into the navigable waters of Boston Harbor shortly after taking off.[143] The court held that even if admiralty tort jurisdiction required some maritime nexus in addition to the locality test, the matter fell within admiralty jurisdiction.[144] In so holding, the Court of Appeals for the Third Circuit noted that maritime law should not remain static and that "[w]hen an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels."[145] Similar cases followed.[146] Courts have even held that injuries sustained in an aircraft due to turbulence are subject to admiralty jurisdiction.[147]

D. *1972 Turning Point: The Plane Crash that Changed Admiralty Tort Jurisdiction*

The United States Supreme Court addressed the issue of plane crashes in navigable water in *Executive Jet Aviation v. City of Cleveland*.[148] On July 28, 1968, a jet struck a flock of seagulls over a runway while taking off and crashed in the navigable waters of Lake Erie.[149] The district court dismissed the petitioner's admiralty claim.[150] The Court of Appeals for the Sixth Circuit affirmed, referring to a locality test that required a relationship between the wrong and some maritime activity.[151] The court of appeals did not reach the "connection" or

141. *See* 46 U.S.C. § 761. Crashes within one marine mile of shore. *Id.*

142. 316 F.2d 758 (3d Cir. 1963).

143. *Id.* at 760. The plane was not a seaplane. *See id.*

144. *See id.* at 763.

145. *Id.*

146. *See* Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970) (upholding admiralty jurisdiction where planes engaged in spotting fish collided and crashed within one marine mile of shore); Horton v. J. & J. Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966) (finding admiralty jurisdiction for plane crash in Atlantic ocean using locality test).

147. *See* Notarian v. Trans World Airlines Inc., 244 F. Supp. 874 (W.D. Pa. 1965).

148. 409 U.S. 249 (1972).

149. *See id.* at 250.

150. *See id.*

151. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971).

"nexus" aspect of the test because it found that the tort occurred over land.[152]

After reciting the history of admiralty tort jurisdiction, the Supreme Court determined that strictly applying the locality test when dealing with aviation cases that may implicate admiralty law is inherently ineffective.[153] The Court stated that over the years there had developed a recognition that "reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."[154]

The petitioner argued that because its plane crashed in navigable water, the navigable water was the locality of the tort.[155] The respondent, on the other hand, argued that because the plane collided with the birds over land, the land was the locality of the tort.[156] The Court found the entire approach troublesome. The Court demonstrated the problem by examining a hypothetical situation in which two planes collide and one crashes on the land and the other crashes in a navigable river.[157] In considering either parties' viewpoint, the Court found the application of admiralty jurisdiction in this hypothetical completely "fortuitous."[158] The Court attributed these problems to the nature of aircraft which "are not restrained by [the] one-dimensional geographic and physical boundaries"[159] that restrain water vessels. The Court concluded:

> 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.[160]

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152. *See id.* The court noted its discussion of the "connection" or "nexus" between the wrong and traditional maritime activity in *Chapman* and *Gowdy*. *Id.*

153. *See Executive Jet*, 409 U.S. at 267.

154. *Id.* at 261.

155. *See id.* at 266-67.

156. *See id.* at 267.

157. *See id.*

158. *See Executive Jet*, 409 U.S. at 267.

159. *Id.* at 268.

160. *Id.* (emphasis added).

Noting that admiralty law deals particularly with the movement of vessels upon the water,[161] and that the rules of admiralty are neither legally nor systematically applicable to aircraft,[162] the Court determined that there is no significant relationship between a land based plane flying from one point to another in the continental United States and traditional maritime activity.[163] Though it precluded a large number of cases from admiralty jurisdiction, the Court suggested that where an aircraft performs a function traditionally within the purview of water vessels, it might bear the requisite relationship to maritime activity needed to pass the jurisdictional test.[164] Thus, *Executive Jet* reflects the same concern for the purposes of admiralty jurisdiction as do the *McGuire* line of cases.[165]

After *Executive Jet*, courts were faced with the question of whether the Supreme Court had actually endorsed a modification of the locality test for all cases involving admiralty jurisdiction. Almost uniformly, these cases held that *Executive Jet* derogated strict adherence to the locality test for admiralty tort cases.[166] The initial cases in the district courts used *Executive Jet* as evidence of doubt in the validity of the locality test.[167] In *Kelly v. J. C. Smith*,[168] the Circuit Court of Appeals for the Fifth Circuit held that "maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity."[169] The court

161. *See id.* at 269-70.

162. *See id.* at 270.

163. *See Executive Jet*, 409 U.S. at 270.

164. *See id.* at 271. The Court drew attention to *Hornsby*, *supra* at note 146, where admiralty jurisdiction was held in a case involving planes used to spot schools of fish. *See id.*

165. *See supra* notes 98-115 and accompanying text.

166. *See* Adams v. Montana Power Co., 354 F. Supp. 111 (D. Mont. 1973) (holding *Executive Jet* "diminished the binding force" of locality test); Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973) (finding *Executive Jet* rationale that maritime relationship test more sensible and consonant with purposes of maritime law correct); Rubin v. Power Auth. of State of N.Y., 356 F. Supp. 1169 (W.D.N.Y. 1973) (using comments in *Executive Jet* leads to application of maritime nexus test in case where divers were drawn into water intakes of generating plant); *but see* Maryland v. Amerada Hess Corp., 356 F. Supp. 975 (D. Md. 1973) (holding plain reading of *Executive Jet* decision does not imply extension beyond airplane cases).

167. *See id.*

168. 485 F.2d 520 (5th Cir. 1973).

169. *Id.* at 524 (footnote omitted).

cited dicta in *Executive Jet* indicating that a strict, mechanical application of the locality test did not suit the purposes of maritime law as effectively as a nexus test.[170] The court also cited prior Fifth Circuit cases which used a nexus test[171] as authority for its holding.[172]

In *Kelly*, the plaintiffs were suspected of poaching on an island where exclusive hunting rights had been granted to a private organization.[173] They were seen leaving the island by boat and were fired upon from land after refusing to stop.[174] Nearly six years after the incident, the plaintiffs sued for their injuries and won.[175] A critical holding at trial was that the suit was in admiralty and not barred by laches.[176] After determining that the locality test was no longer appropriate,[177] the court distilled, from the analysis in both *Executive Jet* and *Peytavin*, four factors to use in determining the extent of the relationship between the wrong and maritime activity.[178] The factors are: "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law."[179] Subse-

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170. *Id.* The court cited the following language from *Executive Jet*:

> . . . there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

Executive Jet, 409 U.S. at 261.

171. *See id.* at 524, *citing* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (holding each incident must have substantial connection with maritime activity for jurisdiction); Watz v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970) (finding jurisdiction test not certain and nexus test reasonable).

172. *See Kelly*, 485 F.2d at 523-24.

173. *Id.* at 521-22.

174. *See id.* at 522.

175. *See id.*

176. *See id.* at 523. Laches "is defined as neglect to assert a right or claim which taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." BLACK'S LAW DICTIONARY 875 (6th ed. 1990).

177. *See Kelly*, 485 F.2d at 524.

178. *See id.* at 525.

179. *Id.* at 525. The court held that since the party most seriously injured was the pilot, the vehicle involved was a boat, and because "admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters," admiralty jurisdiction was appropriate. *Id.* at 526.

quent cases also found that after *Executive Jet*, locality alone was no longer sufficient to find admiralty jurisdiction.[180]

E. *Supreme Court Refinements of the Admiralty Jurisdiction Test*

The United States Supreme Court again faced the admiralty jurisdiction issue in 1982. In *Foremost Insurance Co. v. Richardson*,[181] the Court considered whether there was admiralty jurisdiction when two pleasure boats collided on navigable water.[182] The Court granted certiorari "to resolve the confusion in the lower courts respecting the impact of *Executive Jet* . . . on traditional rules for determining federal admiralty jurisdiction."[183] Specifically, the Court set out to determine if the *Executive Jet* rejection of the strict application of the locality test extended beyond the aviation context.[184] Noting that *Executive Jet* observed criticism of the locality test,[185] and the underlying rational of that ruling, the Court held that "the *Executive Jet* requirement that the wrong have a significant connection with

180. *See* Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976) (holding that after *Executive Jet*, suits involving pleasure craft precluded from admiralty jurisdiction only if alleged wrong does not bear significant relationship to traditional maritime activity); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974) (sustaining admiralty jurisdiction in case involving pleasure boat); Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973) (finding admiralty jurisdiction in case involving infringement of navigation right). Of particular interest are two aviation cases. In *Roberts v. United States*, 498 F.2d 520 (9th Cir. 1974), the court held that the crash of a cargo plane engaged in transporting cargo from Los Angeles to Viet Nam near Okinawa was not a matter precluded from admiralty by *Executive Jet*. *Id.* at 524. The court reasoned that geographic realities made the plane's contact with navigable water more than merely fortuitous and that transocean transportation by plane is analogous to a traditional maritime activity. *Id.* at 524. In *Falgout Boats Inc. v. United States*, 508 F.2d 855 (9th Cir. 1974), the court held that when a sidewinder missile, fired from a U.S. Navy airplane, struck a ship in navigable water, there was admiralty jurisdiction. *Id.* at 856. The court found that because the launching of a missile over navigable waters created a potential hazard to maritime navigation and because Navy aviation is an integral part of the naval service, "it cannot be said that the naval plane's activity over water in the instant case was entirely 'fortuitous' as was the plane involved in *Executive Jet*." *Id.* at 857.

181. 457 U.S. 668 (1982).

182. *Id.* at 669.

183. *Id.*

184. *See id.* at 672.

185. *See id.* at 673.

traditional maritime activity is not limited to the aviation context."[186]

The petitioner argued that this new test required a substantial relationship to *commercial* maritime activity "because commercial shipping is at the heart of the traditional maritime activity sought to be protected by giving the federal courts exclusive jurisdiction over all admiralty suits."[187] The Court, however, noted that noncommercial maritime activity can affect commercial maritime conduct and that admiralty law has traditionally been concerned with navigation.[188] The Court further determined that a distinction between commercial and noncommercial activity would interject uncertainty into the jurisdictional test.[189] Four dissenters, however, argued that because the vessels involved were only pleasure craft, never used in any commercial activity, there was "no connection with any historic federal admiralty interest."[190]

Ultimately, the Court held that the claims arising from the collision of two pleasure boats in navigable waters were subject to admiralty tort jurisdiction.[191] The Court relied on three basic principles to reach its holding: "the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion" that would result from a jurisdictional test tied to the use of a given boat.[192] The Court found that there was a *potential* disruptive impact on navigation, a particular concern of maritime law, when two boats collide on navigable water.[193] Unlike *Executive Jet*, the Court found that the potential hazard to maritime commerce in this case "arises out of activity that bears a substantial relationship to traditional maritime activity."[194]

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186. *Foremost*, 457 U.S. at 674.

187. *Id.*

188. *See id.* at 675.

189. *See id.* at 676.

190. *Id.* at 680 (Powell, J., dissenting) (Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined in the dissent).

191. *See Foremost*, 457 U.S. at 677.

192. *See id.*

193. *See id.* at 675.

194. *See id.* n.5.

These principles, extracted from the holding in *Executive Jet*, were consolidated into a definite test in *Sisson v. Ruby*.[195] In *Sisson*, a fire started on a boat, the Ultorian, while it was docked at a marina.[196] The fire, which started in the vessel's washer/dryer unit, destroyed the Ultorian and damaged the marina and other vessels.[197] The owner of the Ultorian wanted to limit his liability, under the Limited Liability Act,[198] to the value of the salvage of his ship, a mere $800 against claims of over $275,000 brought against him.[199] The District Court for the Northern District of Illinois dismissed Sisson's action and the Court of Appeals for the Seventh Circuit affirmed.[200]

In reversing the lower court and finding admiralty jurisdiction,[201] the Court applied a three part test extracted from the amorphous holding in *Foremost*.[202] First, the facts must satisfy the traditional location test.[203] Second, the Court must assess "the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity."[204] Finally, there must be "a substantial relationship between the activity giving rise to the incident and traditional maritime activity."[205] Again, the assessment is of the general character of the activity.[206] The last two steps together make the "nexus" test.[207]

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195. 497 U.S. 358 (1990).

196. *Id.* at 360.

197. *See id.*

198. *See id.* The owner invoked 46 U.S.C. § 183(a), which limits the liability of an owner of a vessel to the value of the vessel and freight. 46 U.S.C. § 183(a) (1994).

199. *See Sisson*, 497 U.S. at 360.

200. *See id.*

201. *See id.* at 362-63.

202. *See supra* notes 191-93 and accompanying text.

203. *See Sisson*, 497 U.S. at 362. This part of the test was met for the marina was located on a navigable waterway. *See id.*

204. *Id.* at 363.

205. *Id.* at 364.

206. *See id.*

207. Commentators and courts use either the phrase "locality plus", "nexus" or "connection" when referring to this new jurisdictional test. *See* Philip A. Berns, *Regression of Maritime Jurisdiction in Tort Actions*, 3 U.S.F. MAR. L.J. 159 (1990/1991); Phyllis D. Carnilla & Michael P. Drzal, Foremost Insurance Co. v. Richardson: *If This is Water, It Must Be Admiralty*, 59 WASH. L. REV. 1 (1983); John O. Pieksen, Jr., *Much Ado About Nothing, Or Step-By-Step Determinations of Admiralty Tort Jurisdiction:* Sisson v. Ruby, 15 TUL. MAR. L.J. 439 (1991); Jeffrey L.

The Court found the first part of the nexus test easily satisfied.[208] First, the Court characterized the incident by its general features.[209] In so doing, the Court ignored such particulars as the source of the fire or the exact location of the boat at the marina.[210] The incident was thus characterized as "a fire on a vessel docked at a marina in navigable waters."[211] This characterization led the Court to conclude that the incident had the potential to disrupt commercial maritime activity.[212] The Court justified its general characterization of the incident to determine its potential impact by noting that this approach was taken by the Court in both *Foremost* and *Executive Jet*.[213]

For the second part of the nexus test, the Court characterized the activity as "the storage and maintenance of a vessel at a marina on navigable waters."[214] As with the first part of the nexus test, the Court found that the incident, so characterized, easily satisfied the test.[215] Again, the Court justified its general characterization of the activities.[216] This time, the Court reasoned that a more particular examination would require courts to determine, to some extent, "the merits of the causation issue to answer the . . . jurisdictional question."[217]

In making its decision, the Court restricted its holding in a very particular way. The Court noted that this case, like *Executive Jet* and *Foremost*, involved instrumentalities engaged in similar activities.[218] The Court refused to speculate as to how it

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Raizner, *Missing the Boat - Another Failed Attempt to Define Admiralty Tort Jurisdiction:* Sisson v. Ruby, 29 HOUS. L. REV. 733 (1992); Monica A. Beckford & Michael Sanner, Note, *Delta County Ventures: Limiting Admiralty Jurisdiction*, 6 U.S.F. MAR. L. J. 245 (1993); Lawrence R. De Buys IV, Note, *Resetting the Executive Jet Compass Again-* Smith v. Pan Air Corp., 8 MAR. L. 186 (1983); Albert Lin, Comment, *Jurisdictional Splashdown: Should Aviation Torts Find Solace in Admiralty?*, 60 J. AIR. L. & COM. 409 (1994).

208. *See Sisson*, 497 U.S. at 362.

209. *See id.* at 363.

210. *See id.*

211. *Id.*

212. *See id.*

213. *See Sisson*, 497 U.S. at 363-64. *See also supra* notes 160, 191-93 and accompanying text.

214. *Sisson*, 497 U.S. at 365.

215. *See id.* at 367.

216. *See id.* at 365.

217. *Id.*

218. *See id.* n.3.

would decide a case where the instrumentalities involved were not engaged in similar activities.[219] The Court's decision had almost no effect on the lower courts.

Following the decision in *Foremost*, the lower courts continued to struggle with defining a test to determine whether or not a given activity is substantially related to maritime commerce. Though many followed the Fifth Circuit's four factor approach in *Kelly*,[220] others did not use factors[221] and others were still unclear as to which factors to use, including the Fifth Circuit.[222] The Court refused to adopt any of the various circuit tests and found that "*at least in cases in which all of the relevant entities are engaged in similar types of activity*, the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance to the federal courts."[223]

Following *Sisson*, the circuit courts continued to apply the tests that had developed since *Executive Jet*. In *Broughton Offshore Drilling Inc. v. South Central Machine*,[224] the Court of Appeals for the Fifth Circuit held that because the *Sisson* Court neither approved nor disapproved of the *Kelly* approach, it would continue to apply the *Kelly* factors where appropriate until the Supreme Court provided "further guidance."[225] In *Price v. Price*,[226] the Court of Appeals for the Fourth Circuit found

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219. *See id.*

220. *See* Lewis Charters Inc. v. Huckins Yacht Corp., 871 F.2d 1046 (11th Cir. 1989) (citing *Kelly* factors as relevant factors for nexus aspect of jurisdictional test); Eagle-Picher Indus. Inc. v. United States, 937 F.2d 625 (3d Cir. 1988) (noting broad consensus throughout circuits in use of four factors); Guidry v. Durchin, 834 F.2d 1465 (9th Cir. 1987) (using four factors to determine whether "significant relationship to traditional maritime activity exists"); Drake v. Raymark Indus. Inc., 772 F.2d 1007 (1st Cir. 1985) (citing *Kelly* factors as generally accepted standard).

221. *See* Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983) (looking only to facts of case and not predetermined factors).

222. *Compare* Molet v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987) (adding impact of event on maritime commerce, desirability of national rule and need for expertise in trial and decision to *Kelly* factors) *with* Molet v. Penrod Drilling Co., 872 F.2d 1221 (5th Cir. 1989) (applying only four *Kelly* factors). *Compare* Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985) (requiring thorough analysis of at least *Kelly* factors) *with* Bubla v. Bradshaw, 795 F.2d 349 (4th Cir. 1985) (applying only *Kelly* factors).

223. *Sisson*, 497 U.S. at 366, n.4 (emphasis added).

224. 911 F.2d 1050 (5th Cir. 1990).

225. *Id.* at 1052, n.1.

226. 929 F.2d 131 (4th Cir. 1991).

that a factor approach was still acceptable as long as the court characterized the activity at the appropriate level of generality.[227] In *Soniform v. Soniform*,[228] the Court of Appeals for the Third Circuit, noting that the Court in *Sisson* did not provide "explicit guidance for determining whether an activity is substantially related to traditional maritime pursuits," used the *Kelly* factors to decide the issue.[229] In *Sea Vessel, Inc. v. Reyes*,[230] the Court of Appeals for the Eleventh Circuit held that using the *Kelly* factors was "permissive" after *Sisson*.[231]

Thus, after *Sisson*, each circuit was free to adopt whichever test it found most appropriate. Though commentators varied in their assessment, most found the *Sisson* test ambiguous both in its application and in its possible effect on lower courts.[232] Those who advocate a return to the locality test echo the criticisms levied by Justice Scalia's concurring opinion in *Sisson*.[233] Justice Scalia, concerned with judicial economy,[234] advocated either a return to the simple locality test or a modification of the test in *Foremost* in order to simplify its application.[235] In *Grubart v. Great Lakes Dredge & Dock Co.*, the Supreme Court again addressed the issue of admiralty tort jurisdiction.

III. The Case: *Grubart v. Great Lakes Dredge & Dock Company*

Pursuant to a contract with the City of Chicago, Great Lakes replaced certain pilings around the piers of several bridges over the Chicago River.[236] Allegedly, this activity

227. *Id.* at 135.
228. 935 F.2d 599 (3d Cir. 1991).
229. *Id.* at 602.
230. 23 F.3d 345 (11th Cir. 1994).
231. *Id.* at 350, n.9.
232. *See* Berns, *supra* note 206, at 159 (noting limited and uncertain effect of *Sisson* on future applications of test for admiralty jurisdiction); Warren J. Marwedel & Shari L. Friedman, *Admiralty Jurisdiction and the Great Lakes*, 24 U. TOL. L. REV. 345 (1992-1993) (noting ambiguity of *Sisson* test); Piekson, *supra* note 206, at 439 (criticizing uncertainty of *Sisson* test and advocating return to locality test or uniform rules); Raizner, *supra* note 206, at 733 (describing *Sisson* test as creating expansive inquiry).
233. *Sisson*, 497 U.S. at 368.
234. *See id.* at 374 (concurring opinion).
235. *See id.*
236. *See Grubart*, 115 S. Ct. at 1046.

caused the weakening of an old underground freight tunnel.[237] Seven months after the work was completed, water rushed into the tunnel and flooded the downtown area of Chicago.[238] Flood victims brought suit against both the city and Great Lakes in state court.[239] In an attempt to limit its liability via the Limitation of Vessels Owner's Liability Act,[240] Great Lakes brought suit in federal court.[241] The city and one of the state-court plaintiffs, Jerome Grubart, Inc., filed a motion to dismiss for lack of admiralty jurisdiction.[242] The district court granted the motion,[243] but the Seventh Circuit reversed.[244] On appeal, the issue was deceptively simple: "whether or not a federal admiralty court has jurisdiction over claims that Great Lakes' faulty replacement work caused the flood damage."[245]

After a brief exposition of the history of admiralty tort jurisdiction,[246] Justice Souter, writing for the majority,[247] reached the issue of which test applied. The Court found the *Sisson* test applicable: "After *Sisson*, . . . a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity."[248] The Court then outlined the two parts of the "connection" test with language quoted from *Sisson*.[249] First a court must assess the general features of the incident to determine whether the incident has the potential to disrupt maritime commerce.[250] Then it must assess the general features of the activity giving rise to the incident to determine

237. *See id.* at 1047.
238. *See id.* at 1046-47.
239. *See id.* at 1047.
240. 46 U.S.C. § 181.
241. *See Grubart*, 115 S. Ct. at 1047.
242. *See id.*
243. *See id.*
244. *See* Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225, 232 (7th Cir. 1993).
245. *Grubart*, 115 S. Ct. at 1047.
246. *See id.* at 1047-48.
247. The Chief Justice, Justice Kennedy and Justice Ginsburg joined in the majority opinion while Justices O'Connor and Thomas wrote separate concurring opinions. Justice Scalia joined Justice Thomas' concurrence while Justices Breyer and Stevens took no part in the decision.
248. *Grubart*, 115 S. Ct. at 1048.
249. *See id.*
250. *See id.*

whether there is a substantial relationship between the activity and traditional maritime activity.[251]

The Court found that the location test was "readily satisfied."[252] If Great Lakes committed a tort, it could only have done so while replacing the pilings—while it was on navigable water.[253] Further, the Court easily determined, and the parties did not "seriously dispute," that the barge involved was a vessel.[254] The only contention brought by the petitioners in regard to the Extension Act[255] was that the Act should not be read to encompass every case no matter how distant the harm from the activity.[256] The petitioners claimed that the proximate cause inferred into the Extension Act as a jurisdiction-limiting principle requires an investigation into the merits of a case to make a jurisdictional determination.[257] The Court remarked, however, that this argument "assumes that the truth of jurisdictional allegations must always be determined with finality at the threshold of litigation, but that assumption is erroneous."[258]

The Court next turned to the connection test.[259] Before applying the test the Court noted that the "test turns . . . on a description of the incident at an intermediate level of possible generality."[260] Rather than modifying the test determined in *Sisson*, the Court seemed to be attempting to clarify this notion of "generality." In this regard, the Court shunned the extreme possibilities of characterization.[261] The Court generalized the incident as "damage by a vessel in navigable water to an underwater structure."[262] Because the river traffic was stopped during the repairs of the bridge, the determination of whether the incident had the potential to impact maritime commerce was simple.[263]

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251. *See id.*
252. *Id.* at 1049.
253. *See id.*
254. *Grubart*, 115 S. Ct. at 1049.
255. 46 U.S.C. § 740.
256. *See Grubart*, 115 S. Ct. at 1049.
257. *See id.* at 1050.
258. *See id.*
259. *See id.*
260. *Id.* at 1051.
261. *See Grubart*, 115 S. Ct. at 1051.
262. *Id.*
263. *See id.*

The second part of the "connection" test was applied in a like manner. The Court first characterized the activity as "repair or maintenance work on a navigable waterway performed from a vessel."[264] So described, the Court found that there was "no question" that the requisite connection existed between the activity and traditional maritime activity.[265]

The petitioners made numerous arguments to attack this application. First, the city argued that the proper application of this part of the test required consideration of the city's alleged negligence.[266] The Court, however, cited expansive language in *Foremost*, and concluded that as long as the test is met by at least one alleged tortfeasor, this part of the nexus test is met.[267] Further, the Court noted that *Sisson* did not consider the activities of other tortfeasors.[268] Second, the petitioners argued that the activity can be generalized to such a degree that there is no connection to maritime activity.[269] In addressing this argument, the Court attempted to clarify "generality" in this part of the test: "The test turns on the comparison of traditional maritime activity to the *arguably maritime character* of the tortfeasor's activity in a given case; the comparison would merely be frustrated by eliminating the maritime aspect of the tortfeasor's activity from consideration."[270]

Next, Grubart claimed that this Court's application of the *Sisson* test was so expansive as to necessarily include all cases involving a vessel on navigable waters.[271] However,

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264. *See id.*

265. *See id.*

266. *See id.* at 1052.

267. *See id.* The Court quoted *Foremost*: "because the 'wrong' here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction." *Foremost*, 457 U.S. at 674. The Court found that:

> [b]y using the word "involves," we made it clear that we need to look only to whether one of the arguably proximate causes of the incident originated in the maritime activity of a tortfeasor: as long as one of the putative tortfeasors was engaged in traditional maritime activity the allegedly wrongful activity will "involve" such traditional maritime activity and will meet the second nexus prong.

Grubart, 115 S. Ct. at 1052.

268. *See id.*

269. *See id.*

270. *Grubart*, 115 S. Ct. at 1052 (emphasis added).

271. *See id.*

> [t]his Court has not proposed any radical alteration of the traditional criteria for invoking admiralty jurisdiction in tort cases, but has simply followed the lead of the lower federal courts in rejecting a location rule so rigid as to extend admiralty to a case involving an airplane, not a vessel, engage in an activity far removed from anything traditionally maritime.[272]

Therefore, the expansiveness of the rule does not mean that all such cases will fall within the admiralty, rather, they will only *ordinarily* fall within the admiralty.[273]

The final claim made by the petitioners was that a factor test was more appropriate for this situation.[274] The petitioners made this argument in light of the door left open by *Sisson*.[275] They pointed out that *Sisson* only disapproved of the "factor test" approach where all the relevant activities engaged in were similar.[276] They argued that a factor test would improve on the *Sisson* holding because it would further limit the scope of admiralty jurisdiction, thus avoiding the application of federal admiralty law at the expense of state law when the purposes of admiralty do not so require.[277]

The Court found this argument unpersuasive. The Court was not clear, in light of the Extension Act, on "why the need for admiralty jurisdiction in aid of maritime commerce somehow becomes less acute merely because land-based parties happen to be involved."[278] Since the Extension Act extended admiralty jurisdiction to cases involving land-based parties, the Court could not discern any preference in admiralty jurisdiction for non-land based parties.[279] Therefore, application of a stricter test for admiralty jurisdiction would be without justification.[280]

Next, the court addressed the petitioners' concern with the preemption of state law. The Court found the concern specious, for admiralty courts sometimes employ state law.[281] Therefore,

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272. *Id.* at 1052-53.
273. *See id.* at 1053.
274. *See id.*
275. *See id.*
276. *See Grubart*, 115 S. Ct. at 1053.
277. *See id.*
278. *Id.* at 1054.
279. *See id.*
280. *See id.*
281. *See Grubart*, 115 S. Ct. at 1054.

the Court reasoned, the concern is unfounded and ignores "a fundamental feature of admiralty law, that federal admiralty courts sometimes do apply state law."[282]

Further, the Court noted that the modifications of the locality test do not destroy the underlying principle of locality in admiralty tort jurisdiction.[283] The Court noted that it reflects customary practice in seeing jurisdiction as the norm, when the tort originates with a vessel in navigable waters, and in treating departure from the locality principle as the exception.[284] This "approximate shape" of admiralty jurisdiction, the Court found, would be violated by a factor test which invites complexity in application and extensive litigation.[285] For these reasons, the majority applied the *Sisson* test[286] and found the matter subject to admiralty jurisdiction.[287]

The concurring opinion of Justice Thomas, with whom Justice Scalia joined,[288] noted problems with the test developed by the Supreme Court over the past few years, and proposed a return to the strict application of the locality test. The primary reason for a return to this strict test is the preservation of the resources of both the litigants and the judges involved.[289]

Justice Thomas began by noting that the cases following *Executive Jet* failed to respect its self-imposed limitation to cases involving aircraft.[290] The resulting *Foremost-Sisson* test created judicial confusion due to the amorphous quality of what an "incident" or "activity" is.[291] The majority's attempt to clarify the test did not impress Justice Thomas:

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282. *Id. See* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) (finding state law, though often preempted, still has "wide scope" in admiralty cases).

283. *See Grubart*, 115 S. Ct. at 1055.

284. *See id.*

285. *See id.*

286. *See id.* at 1050-51.

287. *See id.* at 1055.

288. *See id.* at 1055-56 (Thomas, J., concurring). The concurring opinion of Justice O'Connor notes that the Court's decision should not be read to automatically extend admiralty tort jurisdiction to all claims and parties involved when admiralty jurisdiction is found to extend to one of the claims. *See id.*

289. *See id.* at 1056.

290. *See id.*

291. *See id.* at 1057.

> The majority does not explain the origins of "levels of generality," nor, to my knowledge, do we employ such a concept in other areas of jurisdiction. . . . Nor does the majority explain why an "intermediate" level of generality is appropriate. It is even unclear what an intermediate level of generality is, and we cannot expect that district courts will apply such a concept uniformly in similar cases.[292]

Noting that the majority draws the line at whimsy, Justice Thomas prefers a clearer rule.[293]

Finally, Justice Thomas found adequate grounds for reversing *Sisson*.[294] In the area of federal subject-matter jurisdiction, he believes that ambiguity and vagueness are grounds for change.[295] Further, the Justice believes that since in other areas of federal subject-matter jurisdiction the Court demands clarity and efficiency, there is reason to demand the same here.[296]

IV. Analysis

The decision in *Grubart* was the best possible decision in light of the problems that surround admiralty tort jurisdiction. Initially, it must be noted that the decision is well reasoned, both in its extension of the *Sisson* test and in that test's application. However, though the *Grubart* decision addresses the competing interests affecting admiralty tort jurisdiction—the interests of judicial economy and restricting the application of admiralty law to cases where the law was meant to apply—it still will not satisfy the most ardent advocates of either interest. Nevertheless, the test adopted is sufficient to remain unchanged for a long time. Further, the decision is neither an aberration nor a retreat from an intractable problem. Instead, the Court faced the issue, logically applied the holdings of prior rulings, and fashioned a decision that addresses the competing interests affecting admiralty tort jurisdiction while creating a catalyst for unity in the lower courts.

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292. *Id.* at 1057-58.
293. *See id.* at 1058.
294. *See Grubart*, 115 S. Ct. at 1058-59.
295. *See id.* at 1058.
296. *See id.* at 1059.

In extending the *Sisson* test to encompass situations where all of the relevant activities engaged in were not similar, the *Grubart* decision removed a meaningless prerequisite to the application of the *Sisson* test. The interest of judicial economy is not furthered by the prerequisite because judicial resources would be expended in determining whether all entities involved were engaged in similar activities. The determination of what constitutes a "similar activity" itself would waste judicial resources. Further, this expenditure of judicial resources cannot be justified by arguing that the prerequisite reserves for the application of admiralty law only those cases for which admiralty law was designed. Rather the application of two distinct admiralty tort jurisdiction tests would probably result in the inequitable application of admiralty law. Therefore, the expansion of the *Sisson* test to incidents where the relevant activities are not the same merely removed a meaningless barrier to the application of a single jurisdictional test.

The *Grubart* characterization of the nexus aspect of the *Sisson* test is reasonable, but mandating a description of the incident at an intermediate level of generality, while clarifying the language of the *Sisson* test, does not remove the ambiguity inherent in the nexus test. However, Justice Thomas' prognosis that "we cannot expect that district courts will apply such a concept uniformly"[297] is overly pessimistic. In its decision, the majority noted that the second part of the nexus test "turns on the comparison of traditional maritime activity to the *arguably maritime character* of the tortfeasor's activity."[298] Thus, at least in regard to the second part of the nexus test, there is clear guidance in how to describe the incident in a general way. Further, the characterizations in *Grubart* and *Sisson* demonstrate how the "intermediate level of generality" should be determined for both parts of the nexus test.

The characterizations in *Sisson* and *Grubart* clearly demonstrate that the level of generality is determined by the purposes of the test. The first part of the nexus test determines whether or not the incident has a potential to disrupt maritime commerce.[299] In *Grubart*, the Court characterized the incident

297. *Grubart*, 115 S. Ct. at 1058.
298. *Id.* at 1052 (emphasis added).
299. *See id.* at 1048.

as "damage by a vessel in navigable water to an underwater structure."[300] Each element of this characterization enables the Court to make the proper determination without being weighted down by particularities of no relevance. Without the phrase, "vessel in navigable water," or if the phrase included such facts as the vessel being a barge with a crane, the generalization would have been improper. A vessel in navigable water could easily impact maritime commerce, but the fact that the vessel is a barge with a crane has no bearing on that determination. Likewise, if the characterization failed to mention that the structure was underwater, or simply stated that the structure was an old freight tunnel, the characterization would have been ineffective because the general characteristics that might implicate maritime concerns are missing.

The second part of the test determines whether or not the activity giving rise to the incident has a substantial relation to traditional maritime activity.[301] Here, the Court characterized the activity as "repair or maintenance work on a navigable waterway performed from a vessel."[302] Simply stating that the activity was work performed from a vessel would have been too broad, for it misses the possible maritime connection. Likewise, stating that the activity was work on an old freight tunnel under the Chicago River would have muddied the issue with irrelevant facts while, again, missing the possible maritime connection. The description of the relevant activities in *Sisson*[303] is subject to the same analysis. There, as in *Grubart*, the Court focused on the aspects of the incidents that might have implicated maritime concerns while ignoring particularized facts that had no bearing, one way or the other, on the potential maritime concerns.[304] By limiting its descriptions of the incidents to only those salient characteristics, the Court in *Sisson* and *Grubart* has set forth a clear analytic structure for litigants and courts.

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300. *Grubart*, 115 S. Ct. at 1051.

301. *See id.* at 1048.

302. *Id.* at 1051.

303. *See supra* notes 208-217 and accompanying text.

304. *See id.*

The *Grubart* majority also found that the structure of the *Sisson* test was "familiar and relatively easy."[305] The factor tests, on the other hand, would "jettison[ ] relative predictability for the open-ended rough-and-tumble of factors, and invit[e] complex argument in a trial court and a virtually inevitable appeal."[306] Whether the Court is correct in its assessment of the predictability of the factor tests, it is clear that now, while the lower courts are required to carry out a somewhat ambiguous description of the incident in question, they are not without guidance. Indeed, *Grubart* has already prompted uniformity in the circuits, and there does not appear to be any particular problem in applying the *Grubart* test.

The movement toward uniformity can be seen in two particular cases. In *McClenahan v. Paradise Cruises, Ltd.*, a district court in the District of Hawai'i found that *Grubart* overruled the multi-factor aspect of the *Delta County Ventures v. Magana*[307] test.[308] In *Coats v. Penrod Drilling Corp.*, the Court of Appeals for the Fifth Circuit found that *Grubart* had overruled its prior "factor" approach first instituted by *Kelly*.[309] Nor have these, or any of the other post-*Grubart* cases found the *Grubert* test particularly problematic in application.[310]

Further, the "intermediate level of generality" mandated in *Grubart* is designed to allow only those cases for which admiralty law was designed to pass the jurisdictional test. Therefore, the judicial resources used to describe the incidents in question will not be wasted.

Those who disagree with applying a nexus test for admiralty tort jurisdiction are also concerned with judicial economy.[311] However, it is impossible to ignore the arguments of those who find the strict locality test ineffective.[312] A jurisdictional test that does not restrict the application of a body of law

305. *Grubart*, 115 S. Ct. at 1055.

306. *Id.*

307. 986 F.2d 1260 (9th Cir. 1993).

308. 888 F. Supp. at 123.

309. 61 F.3d at 1118.

310. *See* cases cited *supra* note 29.

311. *See Grubart*, 115 S. Ct. 1056 (1995) (Thomas, J., concurring); *Sisson*, 497 U.S. at 374-75 (Scalia, J., concurring); *See generally*, Piekson, *supra* note 207; Carnilla & Drzal, *supra* note 207; Raizner, *supra* note 207.

312. *See supra* notes 116-19 and accompanying text.

to those cases for which the law was designed is not effective. Further, the history of admiralty tort jurisdiction clearly supports the primacy of the concern to limit admiralty jurisdiction to cases for which the law was designed. The history of admiralty jurisdiction is one of expansion and retraction. However, this apparent contradictory motion is consistent in that it reflects a persistent judicial and legislative desire to connect admiralty tort jurisdiction to the bounds of admiralty law.

The initial changes to the locality test expanded the reach of admiralty jurisdiction. In *The Propeller Genesee Chief*, the Court extended the reach of admiralty jurisdiction from the seas, ports and extent of the ebb and flow of the tide to all navigable water. In making its decision, the Court determined that commerce on waterways had extended beyond the limited reach of the locality test.[313] In *The Blackheath*, the Court expanded the reach of admiralty jurisdiction to those government aids to navigation traditionally within the reach of admiralty law.[314] Finally, Congress expanded the reach of admiralty law in order to avoid the inequities that came with strict adherence to *The Plymouth* decision which restricted admiralty tort jurisdiction to cases where both the tort and injury were consummated on navigable water.[315] Though expanding the reach of admiralty law, these expansions of the test were aimed at applying admiralty law to cases that were admiralty in nature in the practical assessment of the matter.

After this wave of expansion, courts began to restrict the reach of admiralty law. The impetus was strong. *King v. Testerman*, *Davis v. City of Jacksonville*, *McGuire* and *Chapman* demonstrated the need for a jurisdictional test that requires more than a mere showing of location. Each involved injury to individuals engaged in recreational activity with only negligible possible impact on commercial maritime activity.[316] The cases that refused to strictly apply the locality test, *McGuire* and *Chapman*, both found location to be a rule of limitation as op-

313. *See supra* notes 61-62 and accompanying text.

314. *See supra* note 74 and accompanying text.

315. *See supra* notes 87-89 and accompanying text.

316. *See supra* notes 90-95, 98-108 and accompanying text. *King v. Testerman* is the only case which comes close to satisfying the current test. *See supra* notes 90-92.

posed to a determinative test.[317] Both courts also found that admiralty jurisdiction was properly linked to the business of maritime commerce.[318] After *McGuire* and *Chapman*, even cases with a more obvious connection to maritime commerce employed a nexus test.[319]

Cases involving airplane crashes in navigable water best demonstrate the need for a change in the strict application of the locality test. While strict adherence to the locality test clearly requires finding admiralty jurisdiction when planes crash in navigable water, there is a natural hesitancy in applying admiralty law to situations involving plane crashes. Thus, whether by coincidence or otherwise, it is not surprising that the Supreme Court first moved away from the strict application of the locality test in a case involving a plane crash.

Therefore, an admiralty jurisdiction test based on more than mere locality, though a substantial shift in the law at the time it was instituted, was not an aberration. Rather, the change was a single step in a long journey in American law toward linking the jurisdictional test for admiralty law to maritime commerce—the subject for which admiralty law is designed. Thus, the return to the locality test advocated by Justices Thomas and Scalia would be an aberration both in light of recent Supreme Court rulings, and in light of the history of admiralty tort jurisdiction.

V. Conclusion

As long as there are concerns over the efficient use of judicial resources, there will be debate over jurisdictional tests—especially those that require some factual scrutiny. Such is the case with the test for admiralty tort jurisdiction. Those who want a test that allows only "true" admiralty cases to be subject to admiralty law will always advocate a jurisdictional test that requires greater judicial scrutiny of the factual setting of a case. Those who are concerned with judicial efficiency will not advocate such a jurisdictional test. Though proponents of either view will probably not be satisfied with the current admiralty

317. *See McGuire*, 192 F. Supp. at 869; *Chapman*, 385 F.2d at 966.
318. *See McGuire*, 192 F. Supp. at 871; *Chapman*, 385 F.2d at 965-66.
319. *See supra* notes 109-111 and accompanying text.

tort jurisdiction test, this test is the culmination of many years of judicial reasoning and reflects and addresses the concerns expressed over the years. Further, the relative ease with which the courts have adopted the test described in *Grubart* indicates that judicial resources are not being wasted.

*Dale Van Demark**

* I would like to thank my wife Michelle for her endless patience over the past three years.