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The Expansion of Admiralty Jurisdiction Into the Realm of Workers' Compensation: Newly Applying Learned Hand to Jones Act Personal Injury Claims to Incentivize Dangerous Seafaring Work and Protect Workers From the Perils of the Sea, 48 J. Marshall L. Rev. 877 (2015)

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THE EXPANSION OF ADMIRALTY
 JURISDICTION INTO THE REALM OF
 WORKERS’ COMPENSATION: NEWLY
 APPLYING LEARNED HAND TO JONES ACT
 PERSONAL INJURY CLAIMS TO INCENTIVIZE
 DANGEROUS SEAFARING WORK AND
 PROTECT WORKERS FROM THE PERILS OF
 THE SEA

BLAIR POOLER*

I. INTRODUCTION877

II. BACKGROUND.....879

A. Historic Maritime Law: The Rolls of Oleron 879

B. Admiralty Law in the United States: The Passenger Vessel Services Act, the Jones Act, and the Death on the High Seas Act..... 880

C. Expansion of Admiralty Jurisdiction..... 883

D. Modern Test for Admiralty Jurisdiction..... 886

E. Modern Definition of a “Seaman”..... 886

F. Recent Judicial Responses to Admiralty Expansion 886

III. ANALYSIS889

A. Compare and Contrast: The Casino Worker and the Midshipman 889

B. The Curious Case of the Injured Gambler: Applying Admiralty Jurisdiction to Claims by a Riverboat Casino Customer 891

C. Problems with Judge Posner’s Contemplated Test for Admiralty Jurisdiction..... 895

IV. PROPOSAL.....897

A. Jones Act’s Original Intent to Protect Workers Facing the Perils of the Sea..... 900

B. Using Learned Hand’s Test as a Barometer for Maritime Jobs 901

C. Applying the New Learned Hand Barometer 902

V. CONCLUSION.....904

I. INTRODUCTION

A blackjack dealer drives to a training session at a suburban banquet hall. She steps out of her car, trips, and falls. The blackjack dealer has never used a rope, hauled in an anchor, or participated in any traditional maritime activity beyond standing behind a table dealing cards on a floating casino several days a week. Nevertheless, her employer is now subject to admiralty jurisdiction for an injury that did not occur on or near water because the blackjack dealer

is considered a “seaman” by law.¹

This Comment begins with a brief history of the laws governing personal injury of seamen before launching into an exploration of the problematic implications of the Extension of Admiralty Act,² and how the steady expansion of admiralty jurisdiction has resulted in bizarre results under law.

This Comment proposes a novel application of Learned Hand’s calculus of negligence to divide the protections for traditional³ and non-traditional maritime workers. Workers employed in traditional maritime roles should reap the benefits⁴ of the Jones Act to incentivize⁵ their dangerous line of work.

• Dartmouth College, B.A., 2012; The John Marshall Law School, J.D., 2015.

1. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 348 (1995) (stating the modern rule for what constitutes a seaman). To be considered a seaman, an employee aboard a vessel does not have to participate in the navigation of the vessel, but the worker’s “duties must contribut[e] to the function of the vessel or to the accomplishment of its mission[. This] captures well an important requirement of seaman status.” *Id.* at 357.

2. 46 U.S.C. § 30101 (1948).

3. Historically, a life at sea was a dangerous line of work for the mariners who chose this path. *See Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047) (describing the hardships of a life at sea, including “sickness from change of climate, exposure to perils, and exhausting labour”).

4. Due to the dangerous nature of a seaman’s job, it is important to provide an incentive to encourage people to choose this type of employment. *See Harden*, 11 F. Cas. at 483 (stating that it is very important to provide special health and safety protections for seamen because of “the great public policy of preserving this important class of citizens for the commercial service and maritime defen[s]e of the nation”). The inherent risks involved in a seaman’s line of work are usually called the “perils of the sea.” *Chandris, Inc.*, 515 U.S. at 354; *see Harden*, 11 F. Cas. at 483 (describing the “perils of the sea” that a seaman is subject to because of the particular line of work that he or she does to further the purpose of the ship in its mission to move cargo across the seas).

5. Traditionally, seamen have received maintenance and cure because of the particular nature of their work. “Maintenance” is food and housing “comparable to that which the seaman is entitled while at sea, and ‘cure’ is care, including nursing and medical attention.” *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938). “Cure” is the “payment of medical expenses incurred in the treatment of the seaman’s injury or illness.” Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 *FORDHAM INT’L L.J.* 669, 670 (1991). The concept of maintenance and cure dates back centuries, even appearing in the *Rolls of Oleron*. *Id.* at 699 n.1. *See also Williamson v. Western-Pacific Dredging Corp.*, 304 F.Supp. 509 (D. Or. 1969) (holding that a seaman who was killed should receive maintenance and cure payable to his estate).

In *Williamson*, a seaman’s estate received maintenance and cure after the seaman was killed in a car accident onshore. *Id.* at 515. The court held that because the seaman was given travel expenses and was required to sleep ashore, the seaman was in “service of ship” when the accident occurred. *Id.* at 515–516. *See also Warren v. United States*, 340 U.S. 523, 530 (1951) (holding that the seaman who was injured on shore could recover maintenance and cure).

But see Farrell v. United States, 336 U.S. 511, 517 (1949) (holding that the seaman who was injured was not entitled to permanent disability because his injury was caused by his own negligence when he was returning to his ship after he overstayed his shore leave in an Italian port that had recently been captured by war). While a medieval maritime rule holds a seaman is entitled to life maintenance when a disability occurs as a result of defending a ship against an enemy during war, the seaman in this case was not a “sacrifice to” the ship’s “salvation” because he was lost onshore at the time of his injury and therefore was not “wounded or maimed while defending her against enemies.” *Id.* at 515.

Workers employed in less-dangerous, non-traditional maritime jobs should instead be afforded the same protections as workers employed in equivalent land-based jobs. This new Learned Hand barometer can then become a tool for the federal courts to determine whether they have subject matter jurisdiction over a maritime worker's claim for personal injury. If the federal court determines that the injury did not arise due to a traditional maritime job or a traditional maritime catastrophic occurrence, then the federal court does not have subject matter jurisdiction for the Jones Act personal injury claim. At this point, the personal injury claim must be filed through the state workers' compensation regime.

II. BACKGROUND

This section presents an overview of historic maritime law, stretching back to the thirteenth century, moving forward into the twentieth century with the new development of the Jones Act, and highlighting the most important legal tests that developed in maritime law over time.

A. *Historic Maritime Law: The Rolls of Oleron*

Rules governing the conduct of people performing activities related to ocean trade stretch back for centuries.⁶ One notable set of early maritime laws is the Rolls of Oleron,⁷ also known as the Judgments of the Sea.⁸ While the exact date of authorship for the Rolls of Oleron is unknown,⁹ historians believe that the Rolls of Oleron were first created in Anglo-Norman England in the thirteenth century.¹⁰ The Rolls set down detailed rules governing the conduct of shipmasters, mariners,¹¹ and others involved in shipping, trade, and other maritime activities.¹² The Rolls of Oleron describe specific maritime misdeeds

6. See Timothy J. Runyan, *The Rolls of Oleron and the Admiralty Court in Fourteenth Century England*, 19 AM. J. LEGAL HIST. 95, 95–98 (1975) (discussing the history of very early admiralty law).

7. See *The Rules of Oleron (Circa 1266)*, ADMIRALTY & MAR. LAW GUIDE (Oct. 3, 2013), <http://www.admiraltylawguide.com/documents/oleron.html> [hereinafter *Rules of Oleron*] (providing the complete text of the Rules of Oleron from circa 1266).

8. Edda Frankot, *Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea*, in COMMUNITIES IN EUROPEAN HISTORY: REPRESENTATIONS, JURISDICTIONS, CONFLICTS 151, 153 (Juan Pan-Montojo and Frederik Pedersen eds., 2007).

9. However, one author boasts knowledge of the exact date that the Rolls were written, stating that the Rolls “were drawn up in French in or shortly before 1286.” *Id.* at 153.

10. Runyan, *supra* note 6, at 98. The Rolls of Oleron were primarily created to govern the wine trade between Gascony and England. *Id.* at 99. The rules themselves were derived from court decisions made in the maritime courts on the island of Oleron, off the coast of France. *Id.* at 96. Legend has it that the Rolls may have been written by several famous figures including Otto, Duke of Saxony, Eleanor of Aquitaine, and even Richard the Lion Heart. *Id.* at 98.

11. See *Rules of Oleron*, *supra* note 7 (describing the appropriate actions the master of the ship must take when a mariner is ill or injured).

12. *Id.* (laying out a myriad of different rules governing conduct at sea, including rules of conduct to govern every sort of situation from a shipwreck to an injured seaman).

as well as the prescribed punishments¹³ for these offenses of the high seas.¹⁴ In addition, the Rolls outline specific guidelines for the treatment of mariners. Article VII, circa 1266, states that if a mariner should become injured or ill during the course of a voyage, the master of the ship must get him medical attention onshore, provide him with the same sort of food as he would have received onboard the ship, and continue to pay him his wages during this time.¹⁵ The Rolls of Oleron put the wind in the sails of the developments in admiralty law that followed.

B. Admiralty Law in the United States: The Passenger Vessel Services Act, the Jones Act, and the Death on the High Seas Act

Admiralty law in the United States has been shaped by three notable acts: the Passenger Vessel Services Act,¹⁶ the Jones Act,¹⁷ and the Death on the High Seas Act.¹⁸ Since the first Congress in 1789, the United States has made efforts to protect its interest in U.S. coastwise trade against the possibility of being overshadowed by foreign competition.¹⁹ The purpose behind early

13. *See id.* (listing a number of very specific offenses and their consequences in the Rolls of Oleron circa 1266). The Rolls of Oleron took great pains to carefully describe a great number of specific offenses and the associated consequences of those actions, with many of the consequences set out in vivid detail. *Id.* For example, the Rolls state that if a ship is shipwrecked and the castaway seamen find themselves on shores where they “meet with people more barbarous, cruel, and inhuman than mad dogs” who rob and kill the shipwrecked mariners, then the appropriate punishment for these “wretches” is to “plunge them in the sea till they be half dead, and then to have them drawn forth out of the sea, and stoned to death.” *Id.*

14. *See id.* (describing the harsh punishments under the Rolls of Oleron for killing or robbing from shipwrecked sailors when the ship is destroyed and the sailors find themselves on an unfamiliar shore).

Despite the harsh punishments in the Rolls of Oleron, the benefit of the rules was in their exacting specificity. *Id.* The Rolls cover only very particular events that can happen in relation to the sea: shipwrecks; finding lost valuables along the shore; stealing from shipwrecked seamen; what to do in the event that a mariner is ill or injured at sea; what to do when a seaman is killed while at sea; what course of action a shipmaster should make when the goods he is transporting are in jeopardy; how to distribute goods that are recovered when they are lost from a ship; how to subsidize a ship’s liability when the ship is destroyed but some goods remain that are still salvageable; how to reward good Samaritans who help collect goods that are lost from a ship in the event of bad weather or some other emergency, etc. *Id.*

15. The Rolls instruct the master of the ship that if sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him, and also to spare him one of the shipboys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship.

Id. The Rolls further provide that “if he recover, he ought to have his full wages And if he dies, his wife or next kin shall have it.” *Id.*

16. 46 U.S.C.A. § 55103 (2006).

17. 46 U.S.C.A. § 30104 (2006).

18. 46 U.S.C.A. § 30301 (2006).

19. *See* U.S. CUSTOMS AND BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: THE PASSENGER VESSEL SERVICES ACT 7

protectionist legislation like the Passenger Vessel Services Act was to encourage healthy development in the United States merchant marine and promote successful growth of both the United States' national defense and commercial efforts in coastwise trade.²⁰

The United States passed the Passenger Vessel Services Act in the late 1800s.²¹ The Act provides that

a vessel may not transport passengers between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel: (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and (2) has been issued a certificate of documentation with a coastwise endorsement. . . .²²

The Act also created a system of fines²³ to prevent foreign passengers from jumping ship and entering the United States outside of designated entry points, such as Ellis Island.²⁴

The role of admiralty law in the United States court system changed drastically with the advent of the Merchant Marine Act of 1920, also known as the Jones Act.²⁵ This Act had two major functions: it gave unprecedented

(Apr. 2010), available at http://www.cbp.gov/sites/default/files/documents/pvsa_icp_3.pdf [hereinafter WHAT EVERY MEMBER SHOULD KNOW ABOUT] (describing the history and goals behind early U.S. legislation related to maritime trade and commerce).

20. "Coastwise trade" is a term of art used to describe "vessels engaged in domestic trade, or those traveling regularly from port to port in the United States." *Id.* at 7 n.3. Because of the great importance the United States placed on "coastwise trade" in its early history and the resultant legislation, to this day all vessels participating in coastwise trade must become coastwise-qualified. *Id.* at 7. To become coastwise-qualified, a vessel must be U.S.-built, U.S.-owned, and U.S.-documented. *Id.*

21. *Id.*

22. 46 U.S.C.A. § 55103 (2006).

23. The Act states that a vessel will be charged a \$300 fine for every passenger that disembarks from the vessel before the vessel has reached its final destination. This includes early departures even for medical emergencies. 46 U.S.C. § 55103(b) (2006).

See WHAT EVERY MEMBER SHOULD KNOW ABOUT, *supra* note 19, at 14 (discussing the fines a vessel owner may be subject to if passengers do not embark and disembark at the proper scheduled locations, and describing how a vessel will still be charged a fine even in the event of a medical emergency with one of its passengers). Even in the hypothetical situation of a passenger embarking on a Caribbean cruise in Baltimore, Maryland that is scheduled to return and disembark in Baltimore, Maryland that has to disembark in Florida due to a medical emergency and cannot continue with the cruise, the vessel would still be charged the \$300 fine. *Id.*

24. "Nearly half of all Americans today can trace their family history to at least one person who passed through the Port of New York at Ellis Island." *About Ellis Island*, STATUTE OF LIBERTY-ELLIS ISLAND FOUNDATION, INC., <http://www.libertyellisfoundation.org/about-the-ellis-island> (last visited Mar. 4, 2015).

25. 46 U.S.C.A. § 30104 (2006). See also THOMAS SCHOENBAUM & JESSICA MCCLELLAN, *ADMIRALTY AND MARITIME LAW* 214 (Hornbook Series, 5th ed. 2011) (discussing the rights a seaman has under the Jones Act). A seaman can sue for negligence under the Jones Act when injured in the service of a ship. *Id.* In the event of injury, seamen can also sue the shipowner for unseaworthiness, as well as maintenance and cure. *Id.* See SIR JOSEPH ARNOULD, *A TREATISE ON THE LAW OF MARINE INSURANCE AND AVERAGE* 652 (2d ed. 1850) (stating that the general Doctrine of Unseaworthiness is that "the ship shall be seaworthy for the voyage, by which is meant that she shall be in a fit state, as to repairs, equipment, crew, and all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing on it").

rights to workers²⁶ on ships to sue for injuries on the high seas, and it created protectionist measures for the United States to ensure that all ships in United States ports were made by domestic ship builders and flew the United States flag.²⁷ The Jones Act requirement for all ships to be constructed in the United States and fly the United States flag is called the “cabotage” restriction.²⁸ The Jones Act both narrowed the scope of maritime activities²⁹ in the United States

In addition, the right of ill or injured seamen to receive maintenance and cure and to continue to receive wages is so important that it cannot be abrogated, even by contract. *See Dowdle v. Offshore Express Inc.*, 809 F.2d 259, 266 (5th Cir. 1987) (holding that the seaman’s employer could not force him to agree to a contract that would deprive him of his Jones Act rights entitling him to cure). *Id.* The court also held that the seaman did not forfeit his rights to maintenance and cure, although he could not receive maintenance and cure from his employer for periods of time that his sustenance was provided for by others. *Id.*

See also Williams v. Tidex Int’l, Inc., 674 F. Supp. 548, 550 (E.D. La. 1987) (holding that a seaman may not be forced to contractually give up his rights to unearned wages in the event that he is injured because under the Jones Act). In the same way that an agreement cannot “abrogate the seaman’s right to maintenance and cure,” the right to unearned wages cannot be contractually abrogated unless there is “clear quid pro quo received in exchange for contractual abrogation of right to unearned wages”).

26. *But see* Keli’i Akina, *How to End the Jones Act’s Protectionism*, THE DAILY CALLER (July 18, 2013, 10:48 AM), <http://dailycaller.com/2013/07/18/how-to-end-the-jones-acts-protectionism/> (voicing complaints about how the Jones Act protectionist measures have negatively impacted the local economies of Hawaii, Puerto Rico and Alaska). The article states that the protectionist measures have resulted in “an artificial scarcity of ships due to the inefficiency and the extraordinary cost of U.S. ship construction, driving up cargo costs and limiting domestic commerce.” *Id.*

27. *Jones Act Waivers*, ONLINE LAWYER SOURCE, <http://www.onlinelawyer.com/jones-act/waivers/> (last visited Mar. 5, 2015).

28. *Id.* It should be noted that the Jones Act cabotage requirement can be lifted under special circumstances. *Id.* In non-emergency situations, a foreign vessel or a “vessel of unknown origin” can request a Jones Act waiver to “operate in commercial service or to operate as a commercial passenger vessel.” *Id.* Vessels carrying cargo, towing, or engaging in commercial fishing cannot qualify for Jones Act waivers. *Id.* In addition, vessels can have a maximum of twelve passengers and must be owned by a U.S. citizen. *See Application for Small Vessel Waiver of the Passenger Vessel Services Act*, U.S. DEPARTMENT OF TRANSPORTATION MARITIME ADMINISTRATION, http://www.marad.dot.gov/ships_shipping_landing_page/domestic_shipping/small_vessel_waiver/small_vessel_waiver_request/small_vessel_waiver_request.htm (last visited Mar. 5, 2015) (presenting the Jones Act waiver form).

29. *See Jones Act Waivers*, *supra* note 27 (describing how to acquire a Jones Act waiver). The Jones Act has recently come under scrutiny because critics argue that the requirement that all vessels transporting goods must be U.S.-made and must fly a U.S. flag increases shipping costs to the United States, increasing the price of items brought in from foreign countries. *Id.* This extra cost is noticed particularly in the non-contiguous United States and the territorial islands. For example, Hawaii has requested an exemption from the Jones Act for just this reason. *See Andrew Walden, Sen. Solomon Resolutions Urge Hawaii Jones Act Exemption*, HAW. FREE PRESS (Mar. 1, 2013, 2:13 PM), <http://www.hawaii.freepress.com/ArticlesMain/tabid/56/ID/9015/Sen-Solomon-Resolutions-Urge-Hawaii-Jones-Act-Exemption.aspx> (detailing the contents of Hawaii’s Jones Act Exemption request). In its exemption request, Hawaii states that eighty percent of the goods consumed in Hawaii are imported from the mainland of the United States or from foreign countries, and of those goods, ninety-eight percent of the goods come by ship. *Id.*

In addition, Hawaii states that the high cost of living can be attributed at least in part to the high prices of shipping caused by the Jones Act requirement. *Id.* Transpacific shipping costs are some of the lowest in the world, particularly shipping costs from the United States

by preventing foreign trade vessels from entering U.S. ports³⁰ and expanded admiralty law into the world of torts.

Another law that came into effect is the Death on the High Seas Act (DOHSA), first enacted in 1920.³¹ DOHSA comes into play when an act of negligence causes a death that occurs at sea more than a marine league from shore; however, the damages available under the act are limited to pecuniary losses.³² In addition, even if the negligent act occurs on land, as long as the death occurs on the high seas, then DOHSA applies.³³

C. Expansion of Admiralty Jurisdiction

In the years following the enactment of the Jones Act, the courts tried to limit the scope of liability for injuries under admiralty jurisdiction to those

to Asia, while shipping costs from the mainland of the United States to the Hawaiian Islands are some of the highest. *Id.*

Hawaii argues that the Jones Act places an unduly difficult burden on its state due to the high shipping prices, especially considering the delicate nature of the islands' economies due to their "total dependence on sea freight services... [which make] the economy of Hawaii extremely sensitive to even minor restriction or disruptions in transportation." *Id.* Politically, Jones Act exemption has become a "hot-button" issue among the people of Hawaii, with a survey of political candidates running for federal office showing that Democrats support the Jones Act in Hawaii, while Republicans would prefer that Hawaii become Jones Act exempt. Michael Hansen, *Hawaii Congressional Candidates on the Jones Act*, HAW. REPORTER (July 31, 2012), <http://www.hawaiireporter.com/hawaii-congressional-candidates-on-the-jones-act/123>.

Puerto Rico has also sought an exemption from the Jones Act requirements and Hawaiians have sued the government multiple times to have this restriction lifted. *See generally* Michael Hansen, *Lloyd's List Endorses U.S. Build Exemption for Hawaii, Alaska and Puerto Rico*, HAW. FREE PRESS (Jan. 7, 2013, 4:00 PM), <http://www.hawaiifreepress.com/ArticlesMain/tabid/56/articleType/ArticleView/articleId/8596/Lloyds-List-endorses-US-Build-exemption-for-Hawaii-Alaska-and-Puerto-Rico.aspx> (discussing a recent article that includes Hawaii, Alaska, and Puerto Rico in the list of locations that may benefit from Jones Act exemptions).

30. The cabotage requirement has also been problematic during recent natural disasters and during the Gulf oil spill because the Jones Act restricted foreign vessels from helping with cleanup. *See also* Malia Zimmerman, *National Battle Rages Over Jones Act Exemption in BP Oil Spill-Hawaii's Congressional Delegation is in the Fray*, HAW. REPORTER (June 17, 2010), <http://www.hawaiireporter.com/national-battle-rages-over-jones-act-exemption-in-bp-oil-spill-and-hawaiis-congressional-delegation-is-in-the-fray/123> (discussing the Jones Act debate in relation to the issue of the BP oil spill and the role this debate has in Hawaii). Recently in Nome, Alaska, a storm prevented a shipment of heating oil from arriving, and the United States lifted the cabotage requirement to allow a Russian freight ship to come to the United States to deliver oil. United Press Int'l, Inc., *Iced-in Nome, Alaska Gets Oil*, DISASTER NEWS NETWORK (Jan. 16, 2012), <http://www.disasternews.net/news/article.php?articleid=4395>. Although gale winds ultimately prevented the Russian vessel from arriving at a United States port, the fact that the cabotage requirement was lifted in this circumstance represents the United States' recognition that such a strict requirement is not wise in every case.

31. 46 U.S.C.A. §§ 30301–30308 (2006).

32. *Id.*

33. *See Ostrowiecki v. Aggressor Fleet, Ltd.*, 965 So. 2d 527, 538 (La. Ct. App. 2007), (explaining that "the statute's application is not limited to negligent acts that actually occur on the high seas"). The Supreme Court has repeatedly held that even when the negligent act that causes a death on the high seas occurs on land, DOHSA still applies. *Id.*

actions not “consummated on land.”³⁴ By preventing land-based claims under admiralty jurisdiction, liability for personal injury revolved around the ship.³⁵

Despite historic attempts to limit maritime jurisdiction, in more recent years Congress has expanded the scope of admiralty jurisdiction for personal injury through its enactment of the Admiralty Extension Act in 1948.³⁶ The Admiralty Extension Act extended admiralty tort jurisdiction to all claims for “injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.”³⁷ By enacting this statute, Congress increased the scope of admiralty jurisdiction to claims on land as well as at sea.³⁸

In addition, Congress expanding maritime jurisdiction beyond oceans to inland lakes and rivers, including a list of “federally navigable waterways” that includes the major United States rivers and their tributaries.³⁹ While this gave greater protections to sailors on cargo ships traveling the rivers to major cities, the expansion into the interior waterways also means that water-based pleasure ventures such as casinos are also subject to admiralty jurisdiction.⁴⁰ Following this new development in admiralty law, new admiralty claims started arising that were unlike anything mentioned in the Rolls of Oleron.⁴¹ In response, a judicially-created system of laws was crafted to handle these non-traditional and arguably non-maritime claims.⁴²

In 1984, the Longshore and Harbor Workers’ Compensation Act

34. 46 U.S.C. § 30101(a) (2006).

35. See SCHOENBAUM & MCCLELLAN, *supra* note 25, at 19 (discussing the court’s struggles in trying to preserve the then-current law which held that injuries caused on land could not fall under maritime jurisdiction).

36. 46 U.S.C. § 30101 (2006); see also Notes on 46 USC § 30101, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uscode/text/46/30101> (follow the “Notes” tab) (charting the historical progression of the Act).

37. 46 U.S.C. § 30101 (2006).

38. See *Chandris, Inc.*, 515 U.S. at 360 (stating that seamen can recover under the Jones Act whether they are injured on shore or on land as long as they are injured “in the service of a vessel”).

39. See David Forte, *Admiralty*, THE HERITAGE GUIDE TO THE CONSTITUTION, <http://www.heritage.org/constitution/#!/articles/3/essays/110/admiralty> (last visited Mar. 6, 2015) (discussing the United States’ break in precedent with English law in enacting legislation that extended admiralty jurisdiction from the ocean to inland lakes and rivers).

40. *Id.*

41. See *Davis v. City of Jacksonville Beach*, 251 F. Supp. 327, 328 (M.D. Fla. 1965) (citing that because of the broadly written language of modern admiralty statutes, courts have held that an accident involving a person hit by a surfboard can fall under admiralty jurisdiction). In *Davis*, the court stated that even though the accident between a surfboard and a swimmer “produced no direct or indirect influence on shipping and commerce,” the fact that “a surfboard, by its very nature, operates almost exclusively on the high seas and navigable waters, and, just like a small canoe or raft, potentially can interfere with trade and commerce” was sufficient to establish that admiralty law should apply in the case. *Id.* The court’s holding in *Davis* creates a much wider scope for admiralty jurisdiction than the Rolls of Oleron originally intended.

42. See, e.g., *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 732 (1943) (holding that the shipmaster’s duty to give the seaman maintenance and cure is not extinguished when the seaman is injured onshore as long as the seaman is onshore to fulfill his occupational duties).

(LHWCA)⁴³ expanded protection⁴⁴ beyond seamen⁴⁵ who worked⁴⁶ aboard vessels. LHWCA provides remedies for a broad range⁴⁷ of maritime workers⁴⁸ beyond seamen; specifically, the Act aimed⁴⁹ to benefit land-based maritime workers.⁵⁰

43. 33 U.S.C. §§ 901–950 (1984).

44. See *Health Benefits, Retirement Standards, and Workers' Compensation: Longshore and Harbor Workers' Compensation*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/guide/longshor.htm> (last visited Mar. 6, 2015) [hereinafter *Longshore and Harbor Workers' Compensation*] (describing the Longshore and Harbor Workers' Compensation Act: who is covered, the basic provisions and requirements of the Act, employee rights under the Act, and the different rules that deal with recordkeeping, reporting, and notices under the Act; as well as, the penalties and sanctions for failing to comply with the Act as an employer who employs workers who fall under the provisions of the Act).

45. The Longshore and Harbor Workers' Compensation Act is administered by the Office of Workers' Compensation Programs (OWCP). *Id.* The purpose behind the Act is to provide protections for workers who are not seamen aboard vessels, but who participate in "loading, unloading, repairing, or building a vessel." 33 U.S.C. § 902(4) (1984). Harbor and longshore workers is a category of employees that includes ship repairers, shipbuilders, and ship-breakers. *Id.* § 902(3). To fall under the act, injuries must occur from employment "upon the navigable waters of the United States," which includes "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." *Id.* § 902(4).

46. Certain types of employees are excluded from the Longshore and Harbor Workers' Compensation Act, including "masters or members of a crew of a vessel and any officer or employee of the United States or of any state or foreign government," as well as "[c]ertain other individuals . . . if they are covered by a state workers' compensation law." *Longshore and Harbor Workers' Compensation*, *supra* note 44.

47. Disabled employees who are covered by the Longshore and Harbor Workers' Compensation Act are entitled to receive a percentage of the compensation they would have been receiving had their injury not occurred. *Id.* § 908. Such employees receive compensation at the rate of 66 2/3 percent of the employee's average weekly wage. *Id.* In the event of a surviving spouse or children, this rate can increase, and will be payable on their behalf. *Id.* § 908(d)(1). The rate of 66 2/3 percent of the employee's average weekly wage is the same for workers who are temporarily totally incapacitated from working under the Illinois Workers' Compensation Act. 820 ILCS 305 § 8(b).

In order to facilitate employees covered by the Longshore and Harbor Workers' Compensation Act getting the payments and other benefits to which they are entitled, the Act imposes a notice-posting requirement. 33 U.S.C. § 912. "In the notice, the employer must: 1) designate by name (or title), location and phone number of the employer's official responsible for receiving all notices of injury or death from employees or survivors; and 2) state that the employer has secured its payment of compensation under the Longshore Act and its extensions." *Longshore and Harbor Workers' Compensation*, *supra* note 44.

48. The Longshore and Harbor Workers' Compensation Act also provides for sanctions for failing to comply with its provisions. 33 U.S.C. § 941(f). For instance, if an employer fails to get insurance or become a self-insurer for his or her employees, he or she can be subject to a fine up to ten thousand dollars or imprisonment for up to one year's time. *Id.* § 931(c).

49. See SCHOENBAUM & MCCLELLAN, *supra* note 25, at 43 (discussing the development and implications of the LHWCA).

50. See *The Osceola*, 189 U.S. 158, 159 (1903) (describing a seaman's entitlement to maintenance and cure). *The Osceola* is a historic and classic case that set the ground rules for a seaman's entitlement to maintenance and cure from the shipmaster in the event of the seaman's injury. *Id.*

D. Modern Test for Admiralty Jurisdiction

The modern rule for admiralty jurisdiction was set down in the pivotal case of *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*⁵¹ This case presents⁵² the test for whether an event constitutes a case that invokes admiralty jurisdiction.⁵³ *Grubart* set up a two-prong test consisting of a “location” prong and a “connection with maritime activity” prong.⁵⁴ To satisfy the location prong,⁵⁵ the event giving rise to the injury must have taken place on navigable waters, or, if the injury was suffered on land, the injury must have been caused by a vessel on navigable waters.⁵⁶ To satisfy the “connection with maritime activity”⁵⁷ prong, the court must evaluate two issues: first, whether the general features of the type of incident involved has the potential to have a disruptive impact on maritime commerce; and second, whether the general character of the activity giving rise to the incident in question shows a substantial relationship to traditional maritime activity.⁵⁸

E. Modern Definition of a “Seaman”

The modern test for determining whether an employee of a vessel is a seaman comes from the case of *Chandris, Inc. v. Latsis*.⁵⁹ The test set out in *Chandris* states that to be a seaman, the worker must: (1) contribute to the function of the vessel or to the accomplishment of its mission, and (2) have a connection to a vessel in navigation, substantial both in duration and nature.⁶⁰

F. Recent Judicial Responses to Admiralty Expansion

In recent years following the Expansion of Admiralty Act, peculiar claims have begun to appear within the realm of admiralty law.⁶¹ For example,

51. 513 U.S. 527 (1995).

52. The test for admiralty jurisdiction, the *Grubart* test, was originally set out in *Sisson v. Ruby*, 497 U.S. 358, 359 (1990). However, the test the court developed in *Sisson* was later reaffirmed by *Grubart*, which is why the admiralty jurisdiction test is referred to as the *Grubart* test. See SCHOENBAUM & MCCLELLAN, *supra* note 25, at 32 (describing the relationship between *Sisson* and *Grubart*).

53. *Grubart*, 513 U.S. at 534.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 515 U.S. at 348.

60. *Id.*

61. See *Knight v. Grand Victoria Casino*, No. 98 C 8439, 2000 WL 1434151 at *1 (N.D. Ill. Sept. 27, 2000) (describing a peculiar set of facts that nonetheless may evoke admiralty jurisdiction). In *Knight*, a blackjack dealer aboard a floating riverboat casino fell and injured herself in a parking garage on her way to a training event at a land-based pavilion. *Id.* The court held that as long as she could prove that she fit the definition of “seaman,” then admiralty jurisdiction would apply. *Id.* See also *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1252 (8th Cir. 1980) (describing a fact scenario involving an injury on land that invoked admiralty jurisdiction). In *Duluth*, the court held that admiralty jurisdiction

a dockworker recently sued a ship owner when the dockworker got drunk at work and fell over a railing.⁶²

In response to the many bizarre claims that have been filed under Admiralty jurisdiction, Judge Richard A. Posner suggested in *Tagliere v. Harrah's Illinois Corp.* that a new test for admiralty jurisdiction would be preferable to the system enacted by Congress via the Extension of Admiralty Act.⁶³ A more exact test for admiralty jurisdiction would be to ask whether the claim looks more like a state claim or a federal claim.⁶⁴ Rather than apply this contemplated test, however, Judge Posner and the Seventh Circuit Court of Appeals decided *Tagliere* based on the congressionally enacted standards.⁶⁵ Using the congressionally enacted standards, the court reached the strange conclusion that a customer's injury from a broken bar stool evoked admiralty jurisdiction.⁶⁶

Another interesting nuance of admiralty law that has arisen due to admiralty's applicability to a wider variety of tort claims is the relevancy of appurtenances⁶⁷ to ships. An appurtenance to a vessel is "something that belongs or is attached to"⁶⁸ the vessel. In 1907, an appurtenance of a vessel was limited to items that were requisite to the proper use of a vessel.⁶⁹ To determine the requisite use, the courts used the rule of reasonable necessity.⁷⁰ Over time, courts have found that appurtenances of vessels are considered to be covered under admiralty jurisdiction, which has extended the breadth of admiralty law, as illustrated by the following cases.

For example, in *Anderson v. United States*, Anderson, a civilian employee, was injured when a bomb missed its target after it dropped from an armed F/A-18C aircraft that was engaged in a training exercise based off a

applied to a passenger's injury that occurred in the parking lot alongside a floating casino six minutes after disembarking. *Id.* The court held that admiralty jurisdiction applied because the injury stemmed from the passenger's intoxication that occurred while onboard the casino. *Id.* See also *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 491 (D.P.R. 1992) (holding that admiralty jurisdiction applied under the Admiralty Extension Act to a cruise ship passenger who was stabbed and robbed on a pier after disembarking from a cruise ship). In *Gillmor*, the negligent action that occurred onboard the ship was the crew's omission to warn the passenger about the area's crime problem. *Id.*

62. *Warren v. United States*, 340 U.S. 523, 524 (1951).

63. *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012, 1016 (7th Cir. 2006). The test would give a "slightly better match of law to fact" by "decid[ing] in each case whether admiralty law or state law would make a better fit with the particular circumstances of the accident that had given rise to the suit...." *Id.* at 1015.

64. *Id.*

65. *Id.*

66. *Id.* at 1013.

67. An appurtenance is defined as: "an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it." *Appurtenance Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/appurtenance> (last visited Mar. 6, 2015) [hereinafter MERRIAM-WEBSTER].

68. See *Appurtenance Definition*, BLACK'S LAW DICTIONARY (9th ed. 2009).

69. See *LAWYERS' REPORTS ANNOTATED BOOK 8 797* (Burdett A. Rich & Henry P. Farnham, eds., 1907) (discussing the history and implications of the term "appurtenance").

70. *Id.* at 332. See also *Gazzam v. Moe*, 82 P. 912, 913 (Wash. 1905) (holding that a new rudder stowed onboard a steamship that was sold did not constitute an appurtenance when an old rudder was still installed in the ship was and still serviceable).

United States Ship.⁷¹ At the time of the injury, neither Anderson nor the aircraft were on the aircraft carrier.⁷² Regardless, the Supreme Court found that the aircraft was an appurtenance⁷³ of the vessel⁷⁴ and that the claim was therefore subject to admiralty jurisdiction.⁷⁵ This case significantly extended the definition of an appurtenance of a vessel.

In *Stewart & Stevenson Services, Inc. v. M/V Chris Way MacMillan*,⁷⁶ the Northern District of Mississippi had the opportunity to explore the question of whether equipment not currently installed into a vessel can become “part and parcel” of the vessel, and therefore an appurtenance of the vessel.⁷⁷ The court based its holding on two old principles of maritime law.⁷⁸ The first principle is that “components of a vessel, even though readily removable, which are essential either for her general navigation or for the specific voyage upon which she is embarked become a part of the vessel itself and thus constitute appurtenances or apparel of the vessel.”⁷⁹ The second principle is that “an item of equipment need not be aboard the vessel in order to be an appurtenance of the vessel.”⁸⁰ Using these two principles, the court held that several pieces of equipment became legal appurtenances to a vessel at the point in time that they were delivered to the plaintiff.⁸¹

The laws relating to work at sea are rooted in tradition older than the United States itself.⁸² Maritime workers have enjoyed historical protections based upon the dangerous nature of their work. Recently, however, other workers have qualified to receive these protections, not because of the dangerous nature of their work, but due to a quirk in admiralty jurisdiction. The analysis that follows will explore the peculiar issues that have arisen in admiralty law in greater depth.

71. 317 F.3d 1235, 1236 (11th Cir. 2003).

72. *Id.* See also *Why the Carriers?*, AMERICA’S NAVY, <http://www.navy.mil/navydata/ships/carriers/cv-why.asp> (last visited Mar. 6, 2015) (briefly describing the history and utility of aircraft carriers and presenting photographs and drawings of what United States Navy aircraft carriers look like).

73. See *Anderson*, 317 F.3d at 1238 (stating that “[t]he aircraft are an extension of the ship’s ears (electronic monitoring), eyes (surveillance), and provide offensive and defensive capability”).

74. *Id.* at 1238. This case is rather peculiar because calling the aircraft an appurtenance suggests that the aircraft’s property interest is directly attached to that of the vessel. *Id.* See MERRIAM-WEBSTER, *supra* note 67 (stating the definition of the word “appurtenance”).

75. *Anderson*, 317 F.3d at 1238.

76. 890 F. Supp. 552, 561 (N.D. Miss. 1995) (holding that when two propellers and tail shafts were delivered to plaintiff with the intent of installing these pieces of equipment into the vessel, the equipment became appurtenances of the vessel).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 562.

81. *Id.* at 565.

82. See Runyan, *supra* note 6 (outlining the historic protections that benefited mariners in the thirteenth century through the Rolls of Oleron).

III. ANALYSIS

This analysis will begin by comparing and contrasting the risks that traditional maritime workers face on a day-to-day basis with the workplace risks that non-traditional maritime workers face. Next, the analysis will evaluate several alternate tests for admiralty jurisdiction. It will place a special focus on examining the effects of the test that Judge Posner contemplated, and weighing whether this test is consistent with the traditional goals of maritime jurisdictional requirements.

A. Compare and Contrast: The Casino Worker and the Midshipman

Originally, the Jones Act⁸³ served to protect maritime workers from the perils⁸⁴ of the sea, a unique burden⁸⁵ that only this type of worker had to bear. Although the world has changed a great deal since the days of wooden ships and sailors singing sea shanties as they sailed the seven seas,⁸⁶ modern seamen

83. See *Chandris, Inc.*, 515 U.S. at 354 (1995) (stating that “Congress enacted the Jones Act in 1920 to . . . [create] heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the ‘perils of the sea’”).

84. G. Jameson Carr, *Health Problems in the Merchant Navy*, 2 BRIT. J. INDUS. MED. 65, 65–73 (1945) (giving historical data that as of 1945, marine work was five times more dangerous than other hazardous industries in Britain, and listing numerous foreseeable types of “catastrophes and accidents at sea” that caused bodily injury to U.K. merchant seamen).

85. See Harden, 11 F. Cas. at 483 (C.C.D. Me. 1823) (describing the burden a seaman must bear due to his occupation). The court describes this burden at length:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.

Id.

86. See RICHARD RUNCIMAN TERRY, *THE WAY OF THE SHIP: SAILORS, SHANTIES AND SHANTYMEN 1* (2008) (discussing the history of sea shanties as songs sailors would sing as they were engaged in their labor onboard ship). “Shanties may be roughly divided, as regards their use, into two classes: (a) Hauling shanties, and (b) Windlass and Chapstan. The former class accompanied the setting of the sails, and the latter the weighing of the anchor, or ‘warping her in’ to the warf, etc.” *Id.* at 4.

See LAURA ALEXANDRINE SMITH, *THE MUSIC OF THE WATERS: A COLLECTION OF THE SAILORS' CHANTIES, OR WORKING SONGS OF THE SEA, OF ALL MARITIME NATIONS* (1888) (presenting a collection of sea shanties). Here is an example of a sea shanty that playfully alludes to the sailor’s perils of the sea:

“Go back to your messmates for the last time,
And tell them all from me,
That you’re married to a mermaid
At the bottom of the deep blue sea.”

today face very real risks⁸⁷ as a result of their employment.⁸⁸ These risks range from death by fire onboard ship;⁸⁹ amputated limbs from fast-moving lines, ropes and chains; and electrical shock from electrical equipment in stormy weather.⁹⁰ And, of course, “[t]he most life-threatening situation for every seafarer is a shipwreck.”⁹¹ Because of the dangers associated with this line of work, special incentives are important to make sure that people want to accept these positions.⁹²

In comparison, non-traditional maritime workers engaged in land-type employment generally do not face anywhere near the risks of traditional

Id. at 36.

87. See *Most Dangerous Jobs in Great Britain*, ROYAL HOLLOWAY UNIVERSITY OF LONDON, <http://personal.rhul.ac.uk/uhte/020/Labour%202005/Most%20Dangerous%20jobs.pdf> (last visited Mar. 6, 2015) (showing that the rate of fatal injury is much higher for British workers engaged in seafaring work than for British people employed in the service industries). See also Anne Case and Angus Deaton, *Broken Down by Work and Sex: How Our Health Declines*, in *ANALYSES IN THE ECONOMICS OF AGING* 185, 187 (2005) (stating that manual workers’ health decline is faster than that of other workers).

88. See *Life on the Ship: The Engine Room and Galley*, WOMEN OCEANOGRAPHERS.ORG, <http://www.womenoceanographers.org/Default.aspx?pid=28EF75D5-D130-46c0-947E-5CCBC627B0EE&id=DebbyRamsey> (last visited Mar. 6, 2015) (discussing the functioning of the engines of a modern large ship and the risks experienced on the job by workers in the engine room and galley areas). The article states that “[o]bviously one of the greatest concerns is fire” which is hardly surprising, considering that “[t]he ship can hold up to 300,000 gallons of fuel.” *Id.* The article also describes the method of putting out fires: “[i]f the fire got out of hand in the engine room, the engineer could seal off the fire doors and as a last resort flood the area with either foam or halon gas. The halon gas would suffocate the fire but would also suffocate anybody trapped inside.” *Id.*

89. *Id.*

90. See INTERNATIONAL HAZARD DATASHEETS ON OCCUPATION, SEAMAN, MERCHANT MARINE (1999), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_190247.pdf (informing the reader of all of the safety concerns involved in pursuing a career as a Merchant Marine). The Hazard Datasheet outlines an extensive list of risks that seamen face should they choose to become Merchant Marines. The list includes: falling from the ship into the water; falling off of ship structures such as gangways; injury due to a cave-in of cargo; injury from being struck by moving objects including cargo, mooring lines and hinged doors; burns from steam or engine exhaust; electric shock from electrical equipment in stormy weather; injury from explosions of explosive cargo; cuts or amputations caused by ropes, chains, mooring lines or ship mechanisms; chronic poisoning from contaminated food or water; back injuries from handling heavy loads; and psychological stress caused by “specific aspects of seaman’s work, such as continuous exposure to seafaring dangers[,] prolonged separation from family and from a stable social and cultural environment[,] sleep and rest abnormalities due to standing watches, etc.” *Id.*

91. *Id.*

92. JULIE KOWAL, BRYAN C. HASSEL & EMILY AYSCUE HASSEL, FINANCIAL INCENTIVES FOR HARD-TO-STAFF POSITIONS: CROSS-SECTOR LESSONS FOR PUBLIC EDUCATION 14 (2008), available at https://cdn.americanprogress.org/wp-content/uploads/issues/2008/11/pdf/hard_to_staff.pdf (discussing how monetary incentives make it easier to staff hard-to-fill roles and dangerous positions). “The evidence from across branches – the Army, Navy, Marines, and Air Force – overwhelmingly suggests that these incentives can be highly effective in both recruiting and retaining candidates in shortage areas and undesirable or dangerous positions.” *Id.*

seamen.⁹³ A potential risk for a blackjack dealer who works aboard a floating casino is carpal tunnel syndrome from the repetitive motion of dealing cards.⁹⁴ This type of ailment does not seem to rise to the level of a “peril of the sea.”⁹⁵

B. The Curious Case of the Injured Gambler: Applying Admiralty Jurisdiction to Claims by a Riverboat Casino Customer

In *Tagliere v. Harrah’s Illinois Corp.*,⁹⁶ a customer on a floating casino was injured while gambling at a slot machine when the stool she was leaning against collapsed.⁹⁷ Judge Posner succinctly described the facts of the case in relation to maritime law. “The accident in our case had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land.”⁹⁸ However, the court nevertheless held that the gambler’s injury might very well invoke admiralty jurisdiction based on the facts of the case.⁹⁹

Interestingly, the holding turned upon the simple question of fact of whether the floating casino should be described as “permanently” or only “indefinitely” moored.¹⁰⁰ If the facts revealed that the casino was

93. See Matt Villano, *Between Win and Lose, the Casino Dealer*, N.Y. TIMES (Aug. 12, 2007), http://www.nytimes.com/2007/08/12/business/yourmoney/12pre.html?_r=0

(discussing the plight of the casino worker, stating that “some dealers suffer from carpal tunnel syndrome and other repetitive strain injuries” from dealing so many hands of cards).

94 See ABOLGHASEM MORTAZAVI, AN INVESTIGATION INTO ASSOCIATION BETWEEN CASINO CARD DEALING AND SYMPTOMS OF CARPAL TUNNEL SYNDROME (2008) (examining carpal tunnel syndrome in card dealers).

95. See, e.g., Aaron & Paternoster, Ltd., *Are You an Injured Casino Employee? Call a Casino Worker Injury Attorney to Fight For Your Rights!*, CASINO WORKER INJURIES, <http://www.aaronlawgroup.com/Personal-Injury/Casino-Accidents/Casino-Worker-Injuries.shtml> (last visited Mar. 20, 2015) (highlighting various ailments that employees may suffer as a result of working at a casino). The attorney’s page describes the health problems that a casino worker may face. *Id.* The attorney’s page states:

Working in a casino is exhausting and at times dangerous. You may suffer any number of workplace injuries that qualify for workers compensation benefits. There are many casino jobs that involve continuous motion that can cause repetitive stress injuries. Whether you’re out on the gaming floor, dealing black jack, poker or baccarat, or running a roulette, keno or craps table, your job requires you to make the same motions, hundreds, if not thousands of times a day, and that can turn into carpal tunnel syndrome, tendonitis, shoulder bursitis or other soft-tissue injuries. . . . If you’re a waiter or waitress, carrying trays of cocktails can cause back injuries, as can other casino jobs, such as carrying heavy coin bags to and from slot machines, lifting casino hotel guest’s heavy luggage or setting up or breaking down casino trade show exhibits.

Id. These ailments are clearly less serious than those that traditional maritime workers faced.

96. *Tagliere*, 445 F.3d at 1012.

97. *Id.* at 1013.

98. *Id.*

99. *Id.* at 1016.

100. *Id.* The importance of whether the casino was permanently or merely temporarily moored to the shore stems from the Extension of Admiralty Act and from the statutory definition of what makes a watercraft a “vessel.” *Id.* By statute, “[t]he word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used,

“indefinitely” moored,¹⁰¹ then admiralty jurisdiction would apply.¹⁰² If the facts revealed that the casino was “permanently” moored, then admiralty jurisdiction would not apply.¹⁰³ Whether the casino was “permanently” or “indefinitely” moored to the pier, the accident that occurred at the slot machine had nothing to do with the “perils of the sea” and could just as easily have occurred at a slot machine at a casino on the Las Vegas strip rather than on a riverboat.¹⁰⁴

However, despite the fact that the nature of the gambler’s injury had no relation to any sort of danger that arises from contact with the sea or other navigable bodies of water, the court found that it could apply the *Grubart*¹⁰⁵ location and connection tests to find that admiralty jurisdiction should apply to the facts of Tagliere’s case.¹⁰⁶

First, the court found that the injury in question satisfied the location prong of the *Grubart* test¹⁰⁷ because the injury occurred on navigable

as a means of transportation on water.” 1 U.S.C. § 3 (1947). However, the court has held that in addition to this standard, a watercraft cannot be permanently moored because a watercraft that is permanently moored is no longer “capable of being used . . . as a means of transportation on water.” See also *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 482 (2005) (holding that a watercraft does not constitute a “vessel” when it has been permanently moored because a permanently moored watercraft cannot be capable of maritime transportation); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 630 (1887) (holding that a floating dry-dock used to take ships out of water so that they could be repaired was not a “vessel” in navigation because the dry-dock was permanently moored).

The distinction between a permanently moored watercraft and a temporarily moored watercraft together with the statutory definition of what comprises a “vessel” become significant in the context of the Extension of Admiralty Jurisdiction Act. This act states that “[t]he admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.” 46 U.S.C. § 30101 (2006).

101. For admiralty jurisdiction to apply under the Extension of Admiralty Jurisdiction Act, a riverboat casino must qualify as a “vessel.” To qualify as a vessel, the riverboat casino must not be permanently moored, because if it is permanently moored, it is not “capable of being used . . . as a means of transportation on water” under 1 U.S.C. § 3 (1947). Therefore, under the technical specifications of these two acts, the question of whether the riverboat casino in *Tagliere* was “permanently” or merely “indefinitely” moored made the difference between admiralty law applying to the facts of the case, and admiralty law not applying. *Tagliere*, 445 F.3d at 1016.

102. *Tagliere*, 445 F.3d at 1016.

103. *Id.*

104. See, e.g., *Rushton v. Marina Assocs.*, No. Civ.A. 04-1889, 2005 WL 2176835 (W.D. Pa. Aug. 18, 2005) (setting out nearly identical facts to the facts in *Tagliere*, except the stool’s collapse and the resultant injuries to the customer took place at a casino on dry land in Atlantic City, New Jersey instead of on a floating riverboat casino on the Des Plaines River in Illinois).

105. See *Grubart*, 513 U.S. at 534 (discussing the test for whether a set of facts evokes admiralty jurisdiction, which consists of a two part test: (1) a location prong, which requires the event giving rise to the injury to take place on navigable waters; and (2) a connection prong, which calls for the court to analyze whether the type of incident involved has the potential to have a disruptive impact on maritime commerce, and whether the general character of the activity shows a substantial relationship to traditional maritime activity).

106. *Tagliere*, 445 F.3d at 1015.

107. See *Tagliere*, 445 F.3d at 1015 (explaining why the traditional “location” test set out in *Grubart* is satisfied by the facts of the case, and in addition, the case may also fall “under the general admiralty conferred by 28 U.S.C. § 1333(1), as well”). See also *Kimbley*

waters.¹⁰⁸ Second, in discussing whether the facts of this case fit the first part of the second prong of the *Grubart* test, the court compared the facts of *Tagliere* to another similar case.¹⁰⁹ The court speculated that, although the injury involved in the other case was more likely to have a disruptive effect on maritime commerce because a crewmember was injured, an injury to a passenger could nonetheless still have a potentially disruptive effect on maritime commerce if, for example, the riverboat casino needed to “make an unscheduled stop to get . . . [the passenger] to a hospital . . . or if the injury revealed a dangerous condition that required time-consuming repairs.”¹¹⁰

The court did not dwell on the second part of the connection test, whether the general character of the activity giving rise to the incident in question

A. Kearney, *Seventh Circuit Proposes Better Test For Admiralty Jurisdiction But Applies Extension Of Admiralty Jurisdiction Act*, CLAUSEN MILLER (Oct. 2006), http://www.clausen.com/index.cfm/fa/firm_publication/article/article/f3e5f154-81cf-463a-b3afb3ca199a8d

79/Seventh_Circuit_Proposes_Better_Test_For_Admiralty_Jurisdiction_But_Applies_Extension_Of_Admiralty_Jurisdiction_Act.cfm (discussing *Tagliere* and the Seventh Circuit’s indication that it views the Extension of Admiralty Jurisdiction Act as forming “an independent basis of federal jurisdiction,” as well as remarking upon Judge Posner’s stated desire for a more simplified and common-sense test for admiralty jurisdiction).

108. *Tagliere*, 445 F.3d at 1013. The accident took place on a riverboat casino moored to a pier on the Des Plaines River in Illinois, which the court categorized as a navigable waterway for purposes of admiralty jurisdiction. *Id.* See also Alvin L. Arnold, *Navigable Waters: Four Tests to Determine Navigability*, 22 REAL EST. L. REP. 8 (1993) (summarizing and discussing a Supreme Court determination of four different tests for determining whether a body of water constitutes a “navigable” body of water in the United States for purposes of determining admiralty jurisdiction). Compare *Revisions to the Regulatory Definition of “Navigable Waters,”* ENVTL. PROTECTION AGENCY (Oct. 13, 2013), http://www.epa.gov/osweroe1/content/spcc/spcc_nov08waters.htm (discussing the term “navigable waters” in the context of the Clean Water Act (CWA), including a classification for intrastate lakes and rivers according to whether or not fish or shellfish are taken from them to be sold in interstate commerce).

109. *Tagliere*, 445 F.3d at 1015. See *Weaver v. Hollywood Casino-Aurora, Inc.*, 121 F. Supp. 2d 1169 (N.D. Ill. 2000), *remanded by Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379 (7th Cir. 2001) (discussing the facts of the case in greater detail at the district court level, although the case was later brought to the Seventh Circuit Court of Appeals, and then remanded).

In *Weaver*, a slot machine attendant was injured aboard a riverboat casino. *Weaver*, 255 F.3d at 380. The Seventh Circuit held that the incident easily satisfied the *Grubart* connection test because the gambling boat “was a commercial boat engaged in the transport of passengers for profit (even if its ultimate end was gambling), and without doubt an injury to one of its crew disrupts its participation in maritime commerce.” *Id.* at 836.

In *Weaver*, as described at the district court level, Robbin Weaver was employed as a slot machine attendant on a gambling boat. *Weaver*, 121 F. Supp. 2d at 1170. On the day of the accident, another employee was injured when a “bank” onboard the boat overbalanced and fell over onto the employee’s leg. *Id.* A gambling “bank” is “a moveable chest containing drawers which are filled with coins and tokens.” *Id.*

Weaver injured her wrist while helping to lift the bank off the employee and she later sued under the Jones Act as a result of this wrist injury. *Id.* at 1169. The facts of the case also show that the gambling boat had recently been remodeled, and the banks were still in the process of being bolted to the floor. *Id.* at 1170. The bank had been placed on an uneven part of the floor, which, together with the fact that the gambling boat was subject to some degree of movement due to being afloat on a river, likely led to the bank’s unsteadiness. *Id.*

110. *Tagliere*, 445 F.3d at 1015.

shows a substantial relationship to traditional maritime activity.¹¹¹ Instead, the court seemed to indicate that it did not want to contradict the precedent of another case that held that the connection test was satisfied in a case with similar facts.¹¹²

However, whether or not the casino had the capability of being moved from the shore and relocated to another location along the shoreline does not change the nature of the accident that occurred with the patron and the slot machine stool.¹¹³ The fact still stands that the patron's accident had nothing to do with whether the casino could be moved to another location or whether the casino was permanently affixed to a particular part of the shore.¹¹⁴

Applying admiralty jurisdiction to the *Tagliere* case, despite the court's reasoning for why the facts satisfy the *Grubart* test, seems peculiar and ill-suited to the facts. The uncomfortable application of admiralty jurisdiction to the facts of this case led Judge Posner to speculate about a new way to test for admiralty jurisdiction.¹¹⁵ Judge Posner contemplated¹¹⁶ the creation of a new

111. *Id.*

112. *Id.* In *Tagliere*, the Seventh Circuit indicated that it did not want to “split . . . hairs” on the issue of whether or not an injury to a passenger aboard a floating riverboat casino satisfied the connection test. *Id.* The court noted that the facts in *Weaver* involving a crewmember being injured on a floating casino had satisfied the connection test. *Id.*

113. *Id.*

114. *Id.*

115. *Tagliere*, 445 F.3d at 1016.

116. *Id.* Judge Posner's contemplations are derived from the magistrate judge at the U.S. District Court level, who first examined the facts of the case and determined that state law would fit the facts of the case more appropriately than admiralty law. See *Tagliere v. Harrah's Ill. Corp.*, 04 C 5258, 2005 WL 1126892 (N.D. Ill. May 10, 2005) *rev'd and remanded*, *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006) (visiting the facts of the *Tagliere* case for the first time, evaluating the nature of the accident, and deciding that admiralty jurisdiction would not be the appropriate jurisdiction for the case).

The Magistrate Judge at the United States District Court level called the facts of the *Tagliere* case an “exception to the rule” that torts involving a vessel on navigable waters fall under admiralty jurisdiction. *Tagliere*, 2005 WL 1126892 at *4. The judge reasoned that admiralty jurisdiction should not apply because “running a casino is not a traditional maritime activity.” *Id.* at *5.

In addition, the magistrate judge distinguished the case from the *Weaver* case because in *Weaver*, “the court's decision hinged upon the fact that the casino was navigating and transporting passengers,” whereas at the time of the gambler's accident in *Tagliere*, the riverboat casino was not navigating in navigable waters, nor was it transporting passengers. *Id.* Instead, the riverboat casino was moored to the dock, and, indeed, the riverboat had been moored to the dock for over two years. *Id.* at *6. The court held that the facts in the *Tagliere* case failed the second part of the *Grubart* test because the riverboat casino's only purpose appeared to be gambling, and it did not have the additional purpose of transporting passengers. *Id.*

Had the riverboat also been used for transporting passengers, the court stated that this would have better satisfied the connection test because the riverboat would have then been a vessel navigating in navigable waters, and its activity therefore would have had a substantial relationship to traditional maritime activities. *Id.* at *5. See also *Davis v. Players Lake Charles Riverboat, Inc.*, 74 F. Supp. 2d 675, 675–76 (W.D. La. 1999) (holding that admiralty jurisdiction did not apply to an accident that took place aboard a floating riverboat casino in which a customer fell down a flight of stairs because the “the activity which gave rise to the plaintiff's injury . . . [was] gaming,” and gaming “is not substantially related to a traditional maritime activity.”)

test for admiralty jurisdiction that would require a factual analysis of the circumstances of each case to determine whether the facts of the case would fit more closely under state law or federal admiralty jurisdiction.¹¹⁷

Judge Posner's statements represent a desire to improve upon a system of admiralty jurisdiction that has been extended far beyond the boundaries originally intended for this realm of law.¹¹⁸ At the same time, Judge Posner acknowledges that implementing a test like the one he considered in the *Tagliere* case would be problematic in terms of judicial efficiency.¹¹⁹

Judge Posner states that a case-by-case analysis for whether admiralty or state law should apply would be inefficient and yield only a "slightly better match of law to fact..."¹²⁰ In addition, Judge Posner recognized that adopting a fact-specific analysis could create unwanted ambiguity in the law, and "make the determination of jurisdiction hopelessly uncertain."¹²¹ Despite this, Judge Posner's test would have arrived at a result with "commonsense appeal"¹²² that the court's incongruous result clearly lacks.

C. Problems with Judge Posner's Contemplated Test for Admiralty Jurisdiction

Judge Posner's contemplated test for admiralty jurisdiction that would require courts to examine the facts of each case to evaluate whether to bring a claim under state law or admiralty jurisdiction is appealing in its simplicity.¹²³ Such a test would prevent ill-suited claims from falling under admiralty jurisdiction. However, although appealing, the test that Judge Posner contemplated would run contra to fundamental principles of admiralty law upon which all modern precedent relies.

The test for admiralty jurisdiction, the *Grubart* test, was originally set out in a case called *Sisson v. Ruby*.¹²⁴ However, the test the court developed in *Sisson* was later reaffirmed by *Grubart*,¹²⁵ which is why the admiralty jurisdiction test is referred to as the *Grubart* test.¹²⁶ The United States Supreme

117. *Tagliere*, 445 F.3d at 1016.

118. See Kearney, *supra* note 107 (discussing the "judicial desire for a simpler test for admiralty jurisdiction").

119. *Tagliere*, 445 F.3d at 1016.

120. *Id.* at 1015.

121. *Id.*

122. *Id.* at 1013. In using this phrase, Judge Posner was agreeing that the district court's ruling that admiralty jurisdiction was not applicable to the facts of the case made sense. However, Judge Posner concluded that "the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear." *Id.*

123. See generally Kearney, *supra* note 107 (examining Judge Posner's speculated test in *Tagliere*).

124. 497 U.S. 358, 359 (1990).

125. See SCHOENBAUM & MCCLELLAN, *supra* note 25, at 32 (describing the relationship between *Grubart* and *Sisson*).

126. See generally Brian James Schneider & Moran Reeves Conn, *In Re: Delaware Asbestos Litigation and the Continued Expansion of Maritime Jurisdiction Over Asbestos Claims*, DRITODAY (Sept. 25, 2012), <http://dritoday.org/feature.aspx?id=431> (discussing "the *Grubart* test" in the scope of a maritime asbestos claim); *McClenahan v. Paradise Cruises, Ltd.*, 888 F. Supp. 120, 122 (D. Haw. 1995) (stating that *Grubart* "clarified the

Court decided *Grubart* in 1990, and the case is significant because it represents the Supreme Court's first "complete test for admiralty tort jurisdiction" since 1972.¹²⁷ The problem with Judge Posner's hypothetical new approach to determining admiralty jurisdiction is that his approach would contradict the *Grubart* standard for the proper scope used to characterize the facts of a case for purposes of determining whether the first prong of the connection test is satisfied.

In *Grubart*, the Court stated that the proper way to answer the question posed by the first prong of the connection test – whether the incident involved has the potential to disrupt maritime commerce – is to evaluate the facts "at an intermediate level of possible generality."¹²⁸ This method of proper characterization of the facts for determining whether admiralty jurisdiction applies became an issue in the *Weaver* case.¹²⁹

In *Weaver*, the injured employee aboard a riverboat casino described the incident in which she injured her wrist as "an injury occurring during rescue efforts on a vessel on navigable waters."¹³⁰ The owner of the riverboat casino, in contrast, wanted to characterize the accident as "an injury to a slot machine attendant on a floating casino that cannot move beyond a confined area of water," and that the employee's injury could not have affected maritime commerce.¹³¹ The court found that the employee's description was a better approximation of the *Grubart* standard of evaluating the facts, but stated that a "more appropriate description would be an injury on board a vessel on navigable waters."¹³²

Under Judge Posner's proposed test, the result of whether admiralty jurisdiction applies to this set of facts would likely return exactly the opposite result that the court reached in the *Weaver* case.¹³³ Judge Posner's test calls for "decid[ing] in each case whether admiralty law or state law would make a better fit with the particular circumstances of the accident that had given rise to the suit."¹³⁴ Using this statement of the test as the guidelines for analysis, the question becomes: Would admiralty law or state law fit better with the particular circumstances of the accident that gave rise to the suit?

The *Weaver* facts, when characterized in terms of Judge Posner's "particular circumstance" standard, do not sound remotely like the type of

'Sisson test' of maritime jurisdiction").

127. See Robert C. Adams, *Vaguely Refining Admiralty Tort Jurisdiction: Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 20 TUL. MAR. L.J. 163, 171 (1995) (describing the significance of the *Grubart* case holding in relation to tests of admiralty jurisdiction). The year 1972 was an important year in admiralty law because a case called *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), was decided. This case developed a set of rules for determining admiralty jurisdiction that were further developed in later cases. *Id.*

128. *Grubart*, 513 U.S. at 538.

129. *Weaver*, 255 F.3d at 385–86.

130. *Id.*

131. *Id.*

132. *Id.*

133. See *Tagliere*, 445 F.3d at 1016 (containing Judge Posner's contemplated test for a case-by-case analysis to estimate whether the facts of a given case make the case a better fit for admiralty law or state law jurisdiction).

134. *Tagliere*, 445 F.3d at 1015.

circumstances that traditionally arise under admiralty jurisdiction. The “particular circumstances” of the accident would be described as a slot machine attendant at a casino injuring her wrist while trying to lift a heavy bank from where it had fallen on top of another employee. Using Judge Posner’s suggestion for a new admiralty law test, the test would direct state law application to the facts in *Weaver*, perhaps a claim for negligence or premises liability under state law.¹³⁵

However, although Judge Posner’s approach seems to solve the problem of the over-application of admiralty law, particularly to cases that seem to clearly fall under state law, the problem with this new test is that it applies a different standard for determining the scope of fact characterization. Under *Grubart*, the facts relating to whether an incident has the potential to disrupt maritime commerce must be evaluated “at an intermediate level of possible generality.”¹³⁶ Using the *Grubart* test, the facts of *Weaver* put into an intermediate level of generality can likely be described as the court did in *Weaver*, “an injury on board a vessel on navigable waters.”¹³⁷ Arguably, by describing the incident as merely “an injury on board a vessel on navigable waters,”¹³⁸ the court may have strayed from an intermediate level of generality to a more advanced level of generality. Perhaps a more appropriate description would include an analysis of an injury received during a rescue effort onboard a vessel on navigable waters.¹³⁹

In sum, the problem with Judge Posner’s contemplated test is that it requires an advanced level of detailed analysis into the nature of the facts, rather than the intermediate level of generality required by precedent.¹⁴⁰ The following proposal section will examine an alternate means of modifying how admiralty jurisdiction can apply to today’s world by presenting a new test.

IV. PROPOSAL

The following proposal will explore a novel application of Learned Hand’s calculus of negligence¹⁴¹ to divide jobs into categories: (1) traditional

135. See *Tagliere*, 445 F.3d at 1016 (containing Judge Posner’s contemplated test for determining whether admiralty or state law should apply in a given case).

136. *Grubart*, 513 U.S. at 538.

137. *Weaver*, 255 F.3d at 385–86.

138. *Id.*

139. See *Tagliere*, 445 F.3d at 1016 (containing Judge Posner’s contemplated test).

140. But see David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209, 224 (2003) (discussing the problems that are inherent in the *Grubart* scope that calls for an intermediate level of generality in evaluating whether an incident giving rise to a suit has the potential to disrupt maritime commerce through the scope of examining various criticisms of the test, including a description of the concurring judges in the *Grubart* case itself who expressed reservations about the level of generality scope even at the time that the scope was first presented).

141. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (stating Learned Hand’s test for negligence). Interestingly, Learned Hand’s test arose in the context of a maritime case. Because this test was created with an admiralty case in mind, the test seems well-suited to an admiralty application. It would not feel inconsistent to apply this test once again to an admiralty context because of its creation in the scope of an admiralty issue.

maritime work and (2) traditional land-based work. This new test determines which category a job falls into by comparing the traditional duties and jobs of seafarers of yesteryear to modern jobs aboard vessels. Workers employed in traditional maritime roles should reap the benefits of the Jones Act to incentivize their dangerous line of work. Workers employed in traditionally land-based jobs should instead be afforded protections through state workers' compensation regimes.

This new test's use of categories is based on the ideas of Judge Guido Calabresi,¹⁴² who suggested that the Learned Hand test can be applied to categories of individuals¹⁴³ but stated that it was unlikely ever to be applied because of the difficulties in drawing fair categorical boundaries.¹⁴⁴ In this application, drawing the categories of maritime employment can be done very fairly because the categories can be easily defined. The question is simply whether or not a position of employment fits better into the category of a traditional maritime job, or into the category of a land-based job.

The ultimate goal of this test is to offer Jones Act protection to workers in positions that have historically faced the "Peril of the Sea"¹⁴⁵ as illustrated in the Rolls of Oleron¹⁴⁶ and in manuals and treatises of maritime law over

Learned Hand's test, as stated in the context of *Carroll Towing*, in which a barge broke free from its moorings and caused an injury, is a "function of three variables: (1) The probability that she [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions." *Id.*

142. Guido Calabresi is currently an emeritus professor at Yale Law School. In 1994, he was appointed United States Circuit Judge. *Guido Calabresi: Sterling Professor Emeritus of Law and Professorial Lecturer in Law*, YALE L. SCHOOL, <http://www.law.yale.edu/faculty/GCalabresi.htm> (last visited Mar. 8, 2015).

143. Guido Calabresi & Jon T. Hirschof, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1071 (1972).

144. *Id.*

145. See generally *Shipwrecks Since 1833*, INFOPLEASE, <http://www.infoplease.com/ipa/A0005329.html> (last visited Mar. 8, 2015) (listing all of the shipwrecks since 1833, including the ships' names, the number of casualties involved in each shipwreck, and the cause for the shipwreck's occurrence).

146. See generally *The Solicitor's Journal: London, April 5, 1873*, 17 THE SOLICITORS' J. & REP. 437, 437-38 (1873), available at http://books.google.com/books?id=fqwDAAAAQAAJ&pg=PA435&lpg=PA435&dq=the+solicitors%27+journal+and+reporter+april+5,+1873&source=bl&ots=OYYOVD5tIu&sig=KoUQuHDnZiD_FnaY7pGvX63XGIg&hl=en&sa=X&ei=gGCAUqT_B6mfyQHcpoA4&ved=0CDEQ6AEwAA#v=onepage&q=the%20solicitors%27%20journal%20and%20reporter%20april%205%2C%201873&f=false (analyzing the Rolls of Oleron to facilitate an understanding of admiralty law).

time.¹⁴⁷ By utilizing a comparison between modern seafaring jobs¹⁴⁸ and those of yesteryear, this method can prevent the improper application of Jones Act protections beyond the workers it is supposed to protect to workers employed in land-based jobs who do not face the perils of the sea.

Treating these different categories of workers differently under leads to more tailored and economically viable solutions for both employees and employers.¹⁴⁹ Similarly, treating each categories of worker differently also supports the public policy of worker safety because it encourages employers to invest monies in worker safety based upon the riskiness of the job category rather than counting on the less risky workers under the same insurance plan to disperse the risk.¹⁵⁰

By honoring the original intent of protecting and incentivizing workers

147. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 719 (2007), available at <http://www.law.northwestern.edu/lawreview/v103/n2/703/lr103n2kay.pdf> (discussing that a viable method of analysis for interpreting the Constitution is to examine the “public meaning” by looking at public records and historical material to construe the meaning). See also Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2012) (exploring the idea that the Founders of the United States Constitution were “original-understanding originalists” in that they “anticipated that constitutional interpretation would be guided by the subjective understanding” of the Founding fathers, and that the Founders expected people to rely on the Constitution’s original public meaning). The author cites numerous accounts of early U.S. judges applying non-legislative, public-meaning sources in order to determine the answers to legal questions and understand the original intent of U.S. laws. *Id.* at 1260–62.

148. See *Job Descriptions*, CRUISESHIPJOBS, <http://www.cruiselinesjobs.com/job-descriptions/> (last visited Mar. 8, 2015) (categorizing cruise ship jobs and illustrating the types of jobs contained within each category). Jobs on a modern-day cruise ship can be divided into four categories: entertainment jobs; service and hospitality jobs; personal care jobs; and deck and engine room jobs. *Id.* Entertainment jobs include “host and hostesses, cruise directors and staff, disc jockeys, performers, swimming instructors, [and] shore excursion staff.” *Id.* Service and hospitality jobs include “positions in the restaurants, bars, passenger cabins and retail: waiters and waitresses, bar tenders, cabin stewardesses, cooks, bakers, cleaners, [and] gift-shop assistants.” *Id.* Personal care jobs include positions at “spa facilities, beauty shops and health care: salon operators, beauticians, medical staff, massage therapists and fitness instructors.” *Id.* Employees in deck and engine room jobs “are responsible for maintaining and running the ship.” *Id.*

In addition, cruise ships also offer office jobs. *Id.* The test for whether an employee aboard a vessel is a seaman states that the worker’s “duties must contribut[e] to the function of the vessel or to the accomplishment of its mission.” *Chandris, Inc.*, 515 U.S. at 357. Under this test, cruise ship employees working in office jobs could certainly be characterized as seamen because the office work they do “contribute[s] to the function of the vessel” as well as to “the accomplishment of its mission” in a ministerial sense. *Id.* However, these types of workers are so far removed from the perils of the sea that no type of justification could possibly explain any practical need for these employees to receive Jones Act protection.

149. See *The Role of the Actuary in Workers Compensation*, INTERNATIONAL ACTUARIAL ASSOCIATION, http://www.actuaries.org/CTTEES_SOCSEC/Documents/Role_Actuary_Workers_Compensation.pdf (last visited Mar. 8, 2015) (stating that “[a]ctuarial involvement is critical [in workers’ compensation planning] to ensure that . . . individual risks receive a fair rate that reflects both the characteristics of the job classification and the individual risk’s experience to the extent that it is credible”).

150. See generally Calabresi & Hirschhof, *supra* note 143 (discussing the need to identify which parties are in risky categories and incentivize risk reduction measures).

in a dangerous line of work and by using Learned Hand's balancing test¹⁵¹ as the base of a new barometer for maritime jobs, the *Grubart* test for seaman status¹⁵² can be modified to prevent abuse of Jones Act protections originally granted by Congress to protect seamen.

A. *Intent to Protect Workers Facing the Perils of the Sea*

The intent to protect or favor workers who face the highest dangers at sea can be determined in historical documents by looking at practices involving salvage and prizes in terms of relative compensation of workers. A good measurement of the sentiment to confer benefits on workers involved in the riskiest aspects of maritime activities is the percentage of profits given to different types of seamen when a Man of War successfully captured prizes¹⁵³ or received "Bounty Money for Prisoners¹⁵⁴ taken"¹⁵⁵ in the 1700s. Only seamen who were present onboard during the time of the prize capture were given a portion of the reward.¹⁵⁶ For instance, only "the Captain of the Man of War who shall be actually on board at the taking of the Prize" receives three-

151. See generally Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2018 (2007) (discussing that the Learned Hand test speaks to "unreasonable risk-taking," not mere negligence).

152. *Grubart, Inc.*, 513 U.S. 527 (1995).

153. See HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 273 (1815) (discussing and analyzing the current state of the law in the realm of prizes in the year the volume was published, 1815, as well as examining the current law's historical context). Maritime prizes are vessels, goods, and other effects that are captured during wartime. *Id.*

154. See Jeremy Norman, *Gradual Disappearance of the Long S in Typography*, HISTORYOFINFORMATION.COM, <http://www.historyofinformation.com/expanded.php?id=2729> (last visited Mar. 8, 2015) (describing the history and usage of "j," called the "long S"). The character "j" has often been mistaken in old manuscripts for a lowercase "f." *Id.* In reality, the long S functions as a lowercase "s" and its usage was governed by specific sets of rules that gradually died out in the early 1800s. *Id.* For authenticity, this Comment utilizes historic typeface letters and spellings in quotations taken from historic documents.

155. See ALEXANDER JUSTICE, A GENERAL TREATISE OF THE DOMINION OF THE SEA: AND A COMPLETE BODY OF THE SEA-LAWS 101 of Appendix (3d ed. 1724) (setting forth an exhaustive examination of then-current laws of the sea in the eighteenth century).

Three eighths of the profits would go to the Captain of the Man of War. *Id.* One eighth would go to the Flag-Officer. *Id.* One eighth would be shared between Marine Captains, Sea Lieutenants, and Master. One eighth would be shared between the "Marine Lieutenants, Boat-fwain, Gunner, Purfer, Carpenter, Mafter's Mate, Surgeon's and Chaplain." *Id.* One eighth would be shared between the "Midship-men, Carpenter's Mates, Yeoman of the Sheets, Cox-fwain, Quarter-Mafer, Quarter-Mafer's Mates, Surgeons Mates, Yeoman of the Powder-Room, and Serjeants of Marines." *Id.* The last eighth would be shared by the "Trumpeters, Quarter-Gunners, Carpenter's Crew, Steward, Cook, Armourer, Steward's Mate, Cook's Mate, Gunsmith, Cooper, Swabber, ordinary Trumpeter, Barber, able Seamen, ordinary Seamen, Volunteers by Letter, and Marine Soldiers." *Id.*

156. *Id.* Notably, the author specifically states that this allocation system is only for when all of these members of the ship are present when the prize is captured. *Id.* The allocations change entirely depending on which members of the ship were present during the capture so that those present get a larger share of the profits, and those who were not present get nothing. *Id.*

eighths of the prize profits.¹⁵⁷

In addition, a volume from the early twentieth century states that when there is a salvage situation, those putting themselves into the most danger should be rewarded by receiving a larger share of the salvaged goods.¹⁵⁸ These examples illustrate the principle that those engaged in the most dangerous activities should be compensated the most.

B. Using Learned Hand's Test as a Barometer for Maritime Jobs

The following proposal describes a new test that is consistent with the traditional maritime practice of favoring or giving extra compensation to those who face the highest dangers in their job duties. This proposal uses Learned Hand's proximate cause test¹⁵⁹ as a barometer to test for when maritime jobs involve sufficient danger that the workers can be said to suffer the "perils of the sea," and require the protections of the Jones Act in order to incentivize employees to work in these positions. Applying Learned Hand's test to job descriptions analogous to those of yesteryear makes it possible to analyze the relative risks of jobs at sea today as they pertain to their yesteryear origins to determine the level of protection each job requires. The riskiest jobs – occupied by workers who face the perils of the sea every day – merit Jones Act protection,¹⁶⁰ while less risky jobs – occupied by workers who face no greater risks than their land-based counterparts – should receive protection under workers' compensation.¹⁶¹ In many instances of ordinary workplace injury, workers' compensation can actually meet the needs¹⁶² of workers

157. *Id.*

158. EDWARD STANLEY ROSCOE & THOMAS LAMBERT MEARS, A TREATISE ON THE ADMIRALTY JURISDICTION AND PRACTICE OF THE HIGH COURT OF JUSTICE: AND ON THE VICE-ADMIRALTY COURTS AND THE CINQUE PORTS 121 (3d ed. 1903) (discussing that those who are subjected to the most danger in a salvage situation should receive higher compensation than those put in less danger).

159. See generally Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 587–90 (1985) (exploring different conceptual methods for applying the traditional Learned Hand test, including the Ex Post Learned Hand test). This article demonstrates that the Learned Hand test can indeed be modified to create different forms of the traditional test.

160. The Jones Act is negligence-based. "Courts have long held that as broad as Jones Act liability is, it is not strict liability." *Beech v. Hercules Drilling Co., L.L.C.*, 691 F.3d 566, 576 (5th Cir. 2012) *cert. denied*, 133 S. Ct. 1460, 185 L. Ed. 2d 363 (U.S. 2013).

161. See generally *The Role of the Actuary in Workers' Compensation*, *supra* note 149 (describing workers' compensation as "a scheme whereby employers provide benefits following a workplace injury"). The article states that:

[b]enefits are usually statutory in nature and are generally provided in partial or complete replacement of the injured worker's recourse to the liability system. Payments may include medical treatment, rehabilitation, lost wages, and survivor benefits. While workers compensation schemes may provide full medical cost benefits, statutes generally limit reimbursement for other benefits.

Id.

162. In contrast to the Jones Act, workers' compensation is a no fault system. "Workers' compensation schemes impose strict liability on the employer in return for limiting employee recovery." David S. Starr, *The No-Fault Alternative to Medical Malpractice*

employed in non-traditional jobs better¹⁶³ than Jones Act protection.¹⁶⁴

C. Applying the New Learned Hand Barometer

The steps of this new test are as follows: first, the court must check to see if the employee's job is analogous to a traditional maritime job performed by a seaman; second, if the employee's job is not analogous to a traditional maritime job, the court must then apply a modified version of Learned Hand's balancing test to determine if the general character¹⁶⁵ of the job is dangerous.

This modified test is a function of three variables: (1) the probability that the general character of the employee's job will result in an injury to the employee; (2) the severity of the potential injuries; and (3) the ability of the employee to adequately avoid the dangers associated with the job.¹⁶⁶

When the probability of injury is high, and the severity of potential injuries is also high, and the ability of the employee to avoid these dangers is low, then this worker should be protected under the Jones Act for injuries

Litigation: Compensation, Deterrence, and Viability Aspects of A Patient Compensation Scheme, 20 TEX. TECH L. REV. 803, 821 (1989).

163. Although workers' compensation is an employer protection mechanism, it also benefits the employee by offering quick relief to the injured party. *See* Daniel Keating, *Employee Injury Cases: Should Courts or Boards Decide Whether Workers' Compensation Laws Apply?*, 53 U. CHI. L. REV. 258, 259 (1986) (stating that workers' compensation is "a compromise between the interests of employer and employee – the employee relinquishes his right to bring a tort action in return for a 'certain and speedy' recovery"). The Jones Act, in contrast, does not offer speedy recovery to the injured party. *See* CEDAR RIVER GROUP, JONES ACT REVIEW (2011), available at <http://www.leg.wa.gov/JTC/Documents/Studies/Ferry3/FinalJonesActReport.pdf> (stating that "[i]f Jones Act/General Maritime Law employees sue the state . . . they have to wait on average 31 months between the incident and receiving the settlement which can impose a hardship on the employee").

164. At least one U.S. State has already implemented a change to transition some of its workers currently covered under the Jones Act to coverage under workers' compensation. *See* OFFICE OF FIN. MGMT, A REPORT TO THE LEGISLATURE ON SHIFTING WASHINGTON STATE FERRY EMPLOYEES FROM THE FEDERAL JONES ACT TO THE WASHINGTON STATE WORKERS' COMPENSATION PROGRAM 5 (2010), available at <http://www.ofm.wa.gov/reports/JonesAct.pdf> (discussing the state of Washington's decision to take ferry workers off of Jones Act protection and instead place them under the protection of workers' compensation). The Office of Financial Management for the State of Washington states:

[m]oving crew injury costs to our state's workers' compensation program would have a number of benefits, including: (1) consistency in managing all employee on-the-job injury claims; (2) the possibility of lower liability payments; (3) more predictability and stability in projecting costs through a monthly premium; and (4) elimination of the adversarial nature of negligence claims.

Id.

165. *See* Dale Van Denmark, *Grubart v. Great Lakes Dredge & Dock Company: A Reasonable Conclusion to the Debate on Admiralty Tort Jurisdiction*, 17 PACE L. REV. 553, 585 (1997), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1329&context=plr> (describing the generality test of the *Grubart* case). The authors state that "[e]ach element of th[e] characterization [should] enable[e] the Court to make the proper determination without being weighted down by particularities of no relevance." *Id.* at 585.

166. *See Carroll Towing Co.*, 159 F.2d at 173 (2d Cir. 1947) (stating Learned Hand's balancing test, which is structurally the same as the modified test described in this proposal).

occurring in the general course of this employment. However, when the probability of injury is low, and the severity of potential injuries is also low, even if the ability to avoid these dangers is low, then this worker likely should not be protected under the Jones Act.

The proper method of analyzing the employee's job under this modified test is not an intensive factual examination into each workday. Rather, the standard should be to evaluate the worker's job "at an intermediate level of possible generality" as in the *Grubart* test.¹⁶⁷

A hypothetical will be useful in illustrating the modified test. A traditional maritime job that can easily be analogized to a modern maritime job is the job of a cooper.¹⁶⁸ The job of a cooper¹⁶⁹ is to construct casks, move and fill casks, and to deconstruct casks to save storage space on the ship.¹⁷⁰ Similarly, a person working in a modern-day cargo hold of a ship may need to construct boxes to ship large items, move items onto and around the ship, and potentially deconstruct the boxes at the point of disembarkment. Both of these positions carry considerable risks: the worker could injure his or her back due to heavy lifting, or even get crushed beneath heavy cargo.¹⁷¹ The cooper of yesteryear was subject to equally grave perils which included the possibility of being blown up by burst alcohol casks due to their combustible nature.¹⁷² "Many lives have been sacrificed through accidental fire when drawing spirits by candle light."¹⁷³ As this example illustrates, the real "perils of the sea" for traditional maritime jobs and analogous modern day jobs are death and serious injury.¹⁷⁴

167. *Grubart*, 513 U.S. at 538.

168. See generally *Seguin Moreau History*, SEGUIN MOREAU NAPA COOPERAGE, <http://seguinmoreaunapa.com/about-us/history/> (last visited Mar. 8, 2015) (describing the history of the Seguin Moreau Napa cooperage, which began as two separate cooperages set up in 1870 and 1838).

169. See generally KEN KILBY, *COOPERS AND COOPERING* (2004) (setting forth an exhaustive exploration of the coopering trade, including descriptions of how barrels are made, the timber used to make barrels, and the role of coopers in different settings).

170. *Id.*

171. See Dennis O'Brien, *Seaman Aboard Freighter Crushed By Hatch Door*, DAILY PRESS (Aug. 12, 1999), http://articles.dailypress.com/1999-08-12/business/9908120151_1_virginia-port-authority-virginia-international-terminals-portsmouth-marine-terminal (describing an accident where a seaman was killed aboard a freighter when a 235-foot-long hatch swung and crushed the seaman into a railing).

172. See ROBERT WHITE STEVENS, *ON THE STOWAGE OF SHIPS AND THEIR CARGOES, FREIGHTS, CHARTER-PARTIES, ETC.* 210 (2d ed. 1859) (describing the variety of dangers coopers faced working on ships in the nineteenth century, including the risk of exploding casks).

173. *Id.*

174. In contrast, there is no analogous traditional maritime job to a present-day blackjack dealer. The probability of injury is very low, and the severity of any potential injury is also very low. A blackjack dealer may face a paper cut, or perhaps some harassment from drunken card players. Even if the ability to avoid these dangers is low, this worker should not be protected under the Jones Act. See Ted Gregory, *Sexual Harassment Lawsuits Put Casinos Under Microscope*, CHI. TRIB. (Aug. 6, 1998), http://articles.chicagotribune.com/1998-08-06/news/9808060302_1_grand-victoria-casinos-blackjack-tables (reporting that seven female employees aboard a number of different floating casinos in the Midwest experienced sexual harassment). The author describes floating casinos in the Midwest as "snapshots of Las Vegas, complete with clanging slot machines and flashing

A counterargument to this test would be that for all positions on a vessel, there is always a risk of death due to shipwreck, storms, or other catastrophic events. These are unusual, admiralty-specific risks that would not occur in the general course of employment in a land-based job. Therefore, Jones Act protection should be applied to all workers who are seriously injured or killed as a result of such maritime-exclusive catastrophes.

It could be argued that the question of whether Jones Act protections apply to a particular individual could lead to increased litigation. To avoid this problem completely, this Comment proposes a new system whereby workers filing a personal injury claim through the Jones Act must file a mandatory pre-discovery motion for declaratory judgment as to subject matter jurisdiction. The federal court¹⁷⁵ must then use the new Learned Hand barometer to determine whether the worker has a traditional maritime job or a maritime job that is the equivalent of a land-based job. If the federal court determines that the injury did not arise due to a traditional maritime job or a traditional maritime catastrophic occurrence, then the federal court does not have subject matter jurisdiction for the Jones Act personal injury claim. At this point, the personal injury claim must be filed through the state workers' compensation regime.

V. CONCLUSION

Since the Extension of Admiralty Act was modified to include inland waterways in admiralty jurisdiction, Jones Act provisions originally fashioned to protect workers on the high seas have been applied in situations where injuries should be handled by state workers' compensation regimes. The new Learned Hand barometer for admiralty jurisdiction determines which jobs are traditional maritime jobs deserving of Jones Act protections and which jobs are equivalent to land-based jobs. When the jobs are equivalent to land-based jobs, state workers' compensation applies except in the case of a catastrophic occurrence, such as a shipwreck, that could never occur on land. In this way, the Learned Hand barometer preserves both of the original purposes behind the Jones Act: incentivizing dangerous seafaring work and protecting workers

lights, high-stakes baccarat and blackjack tables." *Id.* The author also states that customers are often rowdy at casinos. *Id.* Still, sexual harassment does not fit into the traditional image of "perils of the sea." See generally Roger Dunstan, *History of Gambling in the United States*, GAMBLING IN CALIFORNIA (Jan. 1997), <http://www.library.ca.gov/crb/97/03/chapt2.html> (discussing the history of gambling, and stating that the "glory days of the flashy riverboat gambler" occurred between 1840 and 1860).

175. The federal courts have original jurisdiction over admiralty claims. U.S. CONST. ART. III, § 2. "The Constitution and the Admiralty Jurisdiction Statute expressly confer admiralty jurisdiction on the federal courts." Kenneth G. Engerrand, *Admiralty Jury Trials Reconsidered*, 12 LOY. MAR. L.J. 73, 100 (2013). This rule has also been codified in Title 28, Judiciary and Judicial Procedure. "The district courts shall have original jurisdiction, exclusive of the courts of the States, of... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. § 1333.

who face the perils of the sea.

