

MLA RECREATIONAL BOATING COMMITTEE

ADMIRALTY JURISDICTION: *FISTICUFFS, SHARK-BITES AND BACKFLIPS*

By: James E. Mercante

I. MARITIME TORT JURISDICTION (*MULTI-PART*) TEST - EASIER SAID THAN DONE.

- A. LOCALITY/SITUS (EASY)
- B. CONNECTION TEST (EASY TO SAY)
 - *PRONG 1* - WHETHER INCIDENT HAS POTENTIAL DISRUPTIVE IMPACT ON MARITIME COMMERCE
 - *PRONG 2* - WHETHER THE ACTIVITY HAS SUBSTANTIAL RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY
- C. APPLYING THE INCIDENT AND ACTIVITY TEST (NOT SO EASY)
 - **INCIDENT:** WHETHER INCIDENT DEFINED AT INTERMEDIATE LEVEL OF POSSIBLE GENERALITY HAS POTENTIALLY DISRUPTIVE IMPACT ON MARITIME COMMERCE
 - **ACTIVITY:** WHETHER GENERAL CHARACTER OF THE ACTIVITY GIVING RISE TO THE INCIDENT SHOWS A SUBSTANTIAL RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY

II. RECENT JURISDICTION DECISIONS THAT TOOK TIME, RESOURCES AND UNCERTAINTY

- A. **FISTICUFFS:** TANDON V. CAPTAIN'S COVE MARINA, 752 F.3d 239 (2d Cir. 2014).
- B. **BACKFLIPS:** IN RE GERMAIN, 824 F.3d 258 (2d Cir. 2016).
- C. **SHARK-BITES:** SPECKER V. KAZMA, 2016 U.S. Dist. LEXIS 95516 (S.D. Cal. 2016).

III. *TIME FOR A SEA CHANGE. COURT'S GOING "OFF COURSE"*

- THE TEST SHOULD BE SIMPLE: WHETHER "TORT OCCURRED ON A VESSEL IN NAVIGABLE WATERS". THE END! (Unless Aircraft Involved).
- THE STAGE HAS BEEN SET: GRUBART (513 U.S. 527, 549) [JUSTICE THOMAS/SCALIA CRITICIZE MODERN TEST]; GERMAIN, 824 F.3d at 275-276).
- BRIGHT LINE TEST NEEDED: CLARITY!
- AVOIDS DELAY, EXPENSE, UNCERTAINTY
- DISCOURAGES JUDICIAL DISCRETION
- INSURERS AND ATTORNEYS WILL KNOW WHAT LAW APPLIES EARLY.
- MLA MIGHT ASSIST IN THE RIGHT CASE /AMICUS