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ADMIRALTY LAW

Expert Analysis

Troubled Waters: A Tweet to the Supremes

By **James Mercante**

Tweet: The test for federal maritime jurisdiction is "*very bad. Sad*." A tort must pass two tests with difficult subparts before proceeding in federal court under admiralty jurisdiction, 28 U.S.C. §1333(1). As noted recently by Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, and previously by U.S. Supreme Court Justice Clarence Thomas, there is nothing more wasteful than spending so much time litigating where to litigate.

The most recent enunciation of the admiralty jurisdiction test was by the Second Circuit in *In re Germain*, 824 F.3d 258 (2d Cir. 2016): First, the tort must occur on navigable waters ("location" test). Second, it must bear a substantial relationship to traditional maritime activity and have a potentially disruptive impact on maritime commerce ("connection" test). Easier said than done.

The multifactor approach and "an ambiguous balancing test" results in contested jurisdiction, motions, rulings, appeals and delay. This "may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better spent on the merits," in a field that had once had such a clearly applicable rule. *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (J. Thomas concurrence).

For instance, the Eastern District of New York anchored maritime jurisdiction over a car accident that occurred while defendant was driving home from a "booze cruise," *Bay Casino v. M/V Royal Empress*, 199 F.R.D. 464 (E.D.N.Y. 1999), while neither the District of Connecticut nor the Second Circuit found jurisdiction to exist over a fist fight on a floating dock that occurred after the parties maneuvered their vessels to a dock to carry out the brawl, *Tandon v. Captain's Cove Marina of Bridgeport*, 752 F. 3d 239 (2d Cir. 2014) (the author represented the vessel owner in this case). The Southern District of New York took on a swimmer's propeller-injury case, *Roane v. Greenwich Swim Comm.*, 330 F. Supp. 2d 306 (S.D.N.Y. 2004), and admiralty jurisdiction surfaced over a scuba diver's shark-bite injury, *Specker v. Kazma*, 2016 U.S. Dist. LEXIS 95516 (S.D. Cal. 2016). Similarly, injury to a guest from a backflip off of an anchored pleasure craft on Oneida Lake did not pass muster when first analyzed by the Northern District of New York (*Germain v. Ficarra*, 91 F. Supp. 3d 309 (N.D.N.Y. 2015), but later passed the test in a unanimous decision of the Second Circuit (*In re Germain*, 824 F.3d 258 (2d Cir. 2016) (the author represented the vessel owner in this case)). An airplane crash into Lake Erie was denied entry to federal court by the U.S. Supreme Court, *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), but a Connecticut federal court found that a helicopter crash into the Atlantic Ocean fell within its maritime jurisdiction. *Sikorsky Aircraft v. Lloyds TSB*

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Gen. Leasing (No. 20), 774 F. Supp. 2d 431 (2011).

Course Correction

Once upon a time (1813), a bright line rule existed: A tort merely had to occur or originate on a vessel in "navigable waters" (a waterway upon which a vessel can travel between states or countries). *Thomas v. Lane*, 23 F. Cas. 957 (CC Me. 1813) (J. Story). This simple test avoided confusion, allowed for consistent results, and curbed inefficiency. The "situs (location) test" was easy and one of the oldest rules in maritime arsenals. But, then came plane crashes into navigable waters and the simple test sank. The bright line rule has faded in recent years, but some notable jurists are advocating that the test revert back to its roots: All torts originating on a vessel upon navigable waters.

Wing It

The "situs" test worked well for most maritime torts. However, "the simplicity of this test was marred by modern cases that tested the boundaries of admiralty jurisdiction with ever more unusual facts." *Grubart*, 513 U.S. 527 (1995) (J. Thomas concurrence).

For example, in the early 1970s, a plane traveling from Ohio to New York struck a flock of seagulls after take-off. The plane crashed into navigable waters sparking a challenge for the court under the then current admiralty jurisdiction test. To address this gap, the Supreme Court expanded the test when confronted with aviation torts because a "vessel" was not involved. The new test required that the incident must bear a significant relationship or "connection" to "traditional maritime activity." *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972). Thus, it appeared that this second prong was to apply only to aviation torts. Nonetheless, the plane's collision with a flock of seagulls failed to satisfy the test because that flight was exclusively overland between points in the continental United States and thus, not a traditional "maritime" activity. Then, in 1986, in *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986), the Supreme Court held that a helicopter crash in the Gulf of Mexico that occurred while transporting workers from an offshore oil platform to Louisiana satisfied the "connection test" because "that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an "island", albeit an artificial one, to the shore." In 2006, a federal court in New York found admiralty jurisdiction when a plane crashed into a residential area in Queens less than two minutes after takeoff because it was en route from New York to the Dominican Republic—a transatlantic flight and thus, a route traditionally performed by a vessel. *In re Air Crash at Belle Harbor*, 2006 A.M.C. 1340 (S.D.N.Y. 2006). This expanded test appears to have been intended to apply to aviation torts, not become the new rule. However, courts subsequently picked up the ball and ran with it applying the test to maritime torts as well.

> It is time to bring back the "bright line" rule, and apply maritime jurisdiction to all torts that originate on a vessel in navigable waters. Ultimately, it's up to the Supreme Court to make the test "see-worthy."

Throughout the next decade, district courts began applying the "connection" test to all water-based torts, including those that originated on a vessel. In doing so, courts struggled with what constituted a "traditional maritime activity"—which were then limited to strictly "commercial" shipping. This misapprehension resulted in a decision initially denying jurisdiction in a collision between two pleasure craft. The decision, however, was reversed by the U.S. Supreme Court in 1982, which recognized that the "primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce … this interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). Under this rationale, the collision between the two pleasure craft fell within maritime jurisdiction as navigation (and sometimes collision) on U.S. navigable waters was clearly related to traditional maritime activity.

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Supreme Court held that a fire onboard a pleasure craft docked at a marina satisfied the "connection" test. Here, however, the court expanded the test even further, holding that the "connection" prong actually had two sub-parts, and required that the (1) activity giving rise to the incident have a substantial relationship to traditional maritime activity, and (2) the

incident must have a potentially disruptive impact on maritime commerce. The waters were further muddied when the "activity" was to be evaluated from its "general character", and the "incident" was to be examined from "*an intermediate level of possible generality*." What exactly that means is anyone's guess. And therein lies the problem.

Tweet: The test is leaking. Time for a sea-change?

In *Sisson*, Justice Antonin Scalia teed up the debate by taking issue with this laborious way of reaching a result, suggesting instead in a concurring opinion that all maritime torts which occur on a vessel in navigable waters fall within maritime jurisdiction. The majority acknowledged but rejected Scalia's argument, finding that it would allow too much discretion and uncertainty which courts were attempting to avoid by adopting a more defined rule. However, the exact opposite has occurred. Under today's multifactor approach, the test can be evaluated differently by parties and judges.

In 1995, Justice Thomas, joined by Scalia, broached the issue again in a significant concurrence in *Grubart v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527 (1995). There, the majority held that the Chicago flood, caused by a spud barge puncturing a pipe while drilling in a river, fell within the scope of admiralty jurisdiction. Noting that the court was now addressing admiralty jurisdiction for the third time in little over a decade, the concurrence by Thomas and Scalia lamented the test as too complicated and not easily applied. In place, they sounded the general alarm again for a bright line rule to be adopted, to wit, "whether the tort occurred on a vessel in navigable waters." Thomas noted that traditional types of maritime torts worked well with the simple situs test, stating that the test was "*once as clear as the 9th and 10th verses of Genesis*." *Grubart*, 513 U.S. at 549.

As previously mentioned, in 2016, the Second Circuit squared off with jurisdiction in *In re Germain*, 824 F.3d 258 (2d Cir. 2016), holding that a backflip off a boat anchored in Lake Oneida into navigable waters fell within the scope of maritime jurisdiction. In a thorough and thoughtful analysis (even noted as such by the Second Circuit, 824 F. 3d at 265), the district court applying the multifactor test defined the incident as "injury to a recreational passenger who jumped from a recreational vessel in a shallow recreational bay of navigable waters," and found that this did not have a potential impact on maritime commerce. On appeal, the Second Circuit reached a different conclusion. Chief Judge Justice Katzmann began the opinion by correctly stating: "In broad strokes, this case concerns a tort involving a vessel on navigable waters." Under the simple situs test, the inquiry could have ended there. However, per Supreme Court precedent, the Second Circuit was obligated to dive into a 20-page discussion on the "connection" test.

Thus, in yet another thorough decision on jurisdiction, in *Germain* Judges Katzmann, Rober Sack, and Raymond Lohier defined the incident as one involving "injury to a passenger who jumped from a vessel on open navigable waters," and this had a potential impact on maritime commerce. Based on this, admiralty jurisdiction was sustained. This decision has been cited to and relied upon throughout the country due to its comprehensive and historical analysis of admiralty jurisdiction.

Notably, the Second Circuit in *Germain* took a jab at the challenging test and advocated the need for a bright line rule. The court acknowledged the inefficiency of litigating the issue of jurisdiction to the extent the modern day test has caused and welcomed a generally applicable rule that extends admiralty jurisdiction to all torts originating on a vessel in navigable waters. The court concluded its decision by stating: "However persuaded we might be by Justice Thomas's concurrence, a majority of the *Grubart* court was not so persuaded, and it is the majority's opinion that we must follow. We therefore decline Germain's invitation to adopt a simpler rule, and we instead apply the test set forth by the *Grubart* majority."

Conclusion

The current admiralty jurisdiction test has caused confusion, expense and inconsistent results. It is time to bring back the "bright line" rule, and apply maritime jurisdiction to all torts that originate on a vessel in navigable waters. Ultimately, it's up to the Supreme Court to make the test "*see-worthy*."