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NOTES AND COMMENTS

PLEASURE BOAT TORTS IN ADMIRALTY JURISDICTION: SATISFYING THE MARITIME NEXUS STANDARD

The traditional test of admiralty tort jurisdiction has been the strict locality rule of *The Plymouth.*[1] That rule extended admiralty jurisdiction to all torts occurring on the high seas or the navigable waters of the United States.[2] The Supreme Court modified this jurisdictional test in *Executive Jet Aviation, Inc. v. City of Cleveland*[3] by adding the requirement that a tort in admiralty "bear a significant relationship to traditional maritime activity."[4] Although *Executive Jet* involved an aviation tort occurring on navigable inland waters,[5] admiralty courts have applied the rule to maritime torts generally.[6]

Since *Executive Jet,* several circuits have considered whether the tortious activities of pleasure craft meet the new jurisdictional stan-

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[1] 70 U.S. (3 Wall.) 20 (1866).

[2] *Id.* at 35-36. Although the Supreme Court never ruled that locality was the *sole* test of admiralty tort jurisdiction, lower federal courts applied the rule exclusively. *See* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253-54 (1972). *See also* Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 61 (1914), where the question of the exclusivity of the locality test was specifically left unresolved. Nevertheless, several courts did recognize the absence of Supreme Court precedent on the issue. *See, e.g.,* McGuire v. City of New York, 192 F. Supp. 866, 869 (S.D.N.Y. 1961).

[3] 409 U.S. 249 (1972).

[4] *Id.* at 268.

[5] Upon takeoff from Cleveland airport on a flight to Portland, Maine, and White Plains, New York, a jet aircraft ingested seagulls into its engines, causing an almost total loss of power. The aircraft crashed into the navigable waters of Lake Erie a short distance from the end of the runway. *Id.* at 250. The Supreme Court denied the plane owner's invocation of admiralty jurisdiction. *Id.* at 274. *See* note 24 *infra.*

[6] *See, e.g.,* Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976) (admiralty jurisdiction sustained upon applying the maritime relationship test to a claim that the United States Coast Guard negligently failed to rescue the plaintiff's decedent); Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973) (maritime relationship test applied in an action brought by a waterskier injured through the negligence of the boat operator, admiralty jurisdiction found lacking); Rubin v. Power Auth. of New York, 356 F. Supp. 1169 (W.D.N.Y. 1973) (drowning deaths of two recreational divers swept into the intake valves of defendant's generating plant held not within admiralty jurisdiction). *See also* Bridwell & Whitten, *Admiralty Jurisdiction: The Outlook For the Doctrine of* Executive Jet, 1974 DUKE L.J. 757 [hereinafter cited as Bridwell & Whitten]; Note, *Admiralty Jurisdiction: Executive Jet in Historical Perspective* 34 OHIO ST. L.J. 355 (1973).

dard.[7] The circuit courts have disagreed on the proper interpretation of the new test with regard to pleasure boats[8] because the *Executive Jet* decision did not clearly establish the parameters of 'traditional maritime activity.'[9] While in the majority of admiralty cases the relationship between tortious conduct and traditional maritime concerns is clear,[10] the operation of pleasure craft on navigable waters

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[7] Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), involved a ship-to-shore gun battle between deer poachers fleeing in a small boat and the defenders of an island hunting preserve located in the Mississippi River. The pilot of the pleasure craft was injured and sought to invoke admiralty jurisdiction in a suit against the owner and the defenders of the hunting preserve. The Fifth Circuit considered the roles of the parties, the type of vehicles involved, the type of injury suffered, and traditional concerns of admiralty law in sustaining admiralty jurisdiction. *Id.* at 525. *See* text accompanying note 82 *infra.*

In St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974), the plaintiff was injured when thrown from a small boat negligently operated by one of the defendants. The accident occurred on a navigable portion of the Arkansas River. The Eighth Circuit sustained admiralty jurisdiction on the ground that a vessel operated on navigable waters satisfied the maritime nexus test.

See Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir. 1975), and text accompanying note 14 *infra. See also* Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975), and text accompanying note 22 *infra.*

In Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973), the court held that an antique ship, permanently moored and used as a museum, was nonetheless a vessel; the ship's location on navigable waters rendered it a proper subject of admiralty jurisdiction. *Id.* at 66.

[8] *Compare* Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir.1975), *with* St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974). *See* text accompanying notes 58-59 *infra.*

[9] The *Executive Jet* opinion implies that traditional maritime activity is predominantly commercial in nature and that admiralty courts were created to deal with the problems of the shipping industry. *See* 409 U.S. at 254-57. *See also* note 10 *infra.* However, the opinion also mentions the navigation of vessels as a legitimate concern of admiralty courts. *Id.* at 256. Since pleasure craft generally are considered vessels in navigation, *see* St. Hilaire Moye v. Henderson, 496 F.2d 973, 979 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974), *Executive Jet* offers some support for the contention that pleasure boats must be considered within admiralty jurisdiction. Nevertheless, *Executive Jet* does not require the conclusion that navigation alone is sufficient to establish maritime nexus. *See* text accompanying notes 45-46 *infra.*

[10] One treatise states that:

> It should be stressed that the important cases in admiralty are not the borderline cases on jurisdiction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seaman's injuries and the like—all well and comfortably within the circle, and far from the penumbra.

G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, 24 n.88 (1957), *quoted in* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 254 (1972).

presents a borderline situation.[11] Although courts agree that the new 'locality plus'[12] test does not necessarily exclude all pleasure craft torts from admiralty jurisdiction,[13] the courts disagree over which activities of pleasure boats are sufficiently related to traditional maritime concerns to justify the exercise of that jurisdiction.

The Fourth Circuit recently considered the problem of pleasure boating within admiralty jurisdiction in *Richards v. Blake Builders Supply, Inc.*,[14] which joined two pleasure craft cases. The Virginia case[15] involved a claim against the manufacturer of a motorboat which exploded causing a passenger's death. The accident occurred on Lake Gaston, a man-made lake formed by two dams on the Roanoke River, and located partly in Virginia and partly in North Carolina.[16] In the North Carolina case,[17] a passenger was injured when a boat veered off course and crashed into the bank of the Cape Fear River.[18] Although the Fourth Circuit sustained admiralty jurisdiction in each case,[19] the *Richards* opinion urged the "relinquishment of admiralty jurisdiction in controversies arising out of the operation of small pleasure craft on inland lakes."[20] Nevertheless, the court concluded that the denial of jurisdiction was not possible within the

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[11] *See* note 8 *supra.* As noted by the Supreme Court in *Executive Jet,* "it is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction." 409 U.S. at 255.

[12] The test is usually described as the "locality plus maritime relationship test." The phrase "locality plus maritime nexus" is also appropriate, and the terms are used interchangeably.

[13] *See* note 7 *supra. See also* Kayfetz v. Walker, 404 F. Supp. 75 (D. Conn. 1975); Banchi v. Miller, 388 F. Supp. 645 (E.D. Pa. 1974).

[14] 528 F.2d 745 (4th Cir. 1975).

[15] King v. Harris-Joyner Co., 384 F. Supp. 1231 (E.D. Va. 1974), rev'd sub nom. Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir. 1975).

[16] The Fourth Circuit opinion did not make clear the extent of commercial activity on Lake Gaston but stated that "[t]here is nothing to suggest that Lake Gaston, though navigable, supports any substantial commercial activity." 528 F.2d at 747. *See* note 102 *infra.*

[17] Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 747 (4th Cir. 1975) (district court case unreported).

[18] The vessel owner sought to limit his liability to the value of the vessel. The Limitation of Liability Act, 46 U.S.C. §§ 180-189 (1970) grants the right to restrict damages in admiralty proceedings. *See* note 107 *infra.*

[19] *See* text accompanying notes 60-67 *infra.*

[20] 528 F.2d at 748. Only the Virginia case involved the operation of a pleasure boat on an inland lake. *See* text accompanying notes 15 & 16 *supra.* Yet the Fourth Circuit expressed disapproval of the exercise of admiralty jurisdiction in both the Virginia and North Carolina cases. Despite specific reference to pleasure boating on inland lakes, the court's analysis is not confined to that class of pleasure boating torts.

parameters of the locality plus test of *Executive Jet.*[21] Thus, the Fourth Circuit declined to interpret *Executive Jet* as overruling prior precedent for the inclusion of pleasure craft in admiralty jurisdiction.[22]

The Ninth Circuit, however, reached a different result in *Adams v. Montana Power Co.*,[23] a case factually similar to *Richards.* The *Adams* suit was brought in admiralty to recover for the drowning death of plaintiff's decedent which resulted when his small pleasure boat was capsized by a discharge of water from the defendant's dam. The accident occurred on a portion of the Missouri River completely

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[21] 528 F.2d at 748

[22] *See* note 8 *supra. See also* text accompanying note 76 *infra.* Despite the court's conviction that the exercise of federal admiralty jurisdiction in *Richards* was inappropriate, the Fourth Circuit concluded:

> we do not feel that we are free to read into the Supreme Court's holding in Executive Jet Aviation a release from what seems to have been the settled course of decision in the Supreme Court as well as in the lower federal courts.

528 F.2d at 748. The 'settled course of decision' is that group of cases in which the Supreme Court assumed that admiralty jurisdiction included the operation of pleasure craft on navigable waters. *See, e.g.,* Levinson v. Deupree, 345 U.S. 648 (1953), and note 58 *infra.* In Just v. Chambers, 312 U.S. 383 (1941), passengers on a pleasure boat brought an action against the estate of the deceased boat owner for injuries resulting from carbon monoxide poisoning. The owner's estate sought to limit its liability pursuant to the Limitation of Liability Act, currently codified at 46 U.S.C. §§ 183 *et seq.* (1970). *See* note 107 *infra.* The Supreme Court in *Just* assumed without discussion that admiralty jurisdiction was appropriate. In Coryell v. Phipps, 317 U.S. 406 (1943), petitioners sought to recover for the destruction of their pleasure vessels caused by the explosion of gasoline fumes in the engine room of respondent's yacht. The Supreme Court again assumed that admiralty jurisdiction was properly invoked. The *Richards* court reasoned that *Executive Jet,* since it dealt with an aviation tort, could not be interpreted to overrule the prior decisions granting admiralty jurisdiction in pleasure boating cases. 528 F.2d at 749. The Fourth Circuit reconciled its decision in Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973), with that in *Richards* by noting that the Supreme Court had expressly disapproved a finding of admiralty jurisdiction in waterskiing cases similar to *Crosson; see* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 256 (1972), *citing* King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (involving injury to waterskiers).

The Fourth Circuit decision in Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758 (4th Cir. 1973), is similarly distinguishable. That case involved a diving accident on a lake where the defendant controlled the water-level. Admiralty jurisdiction was denied on the ground that the *Executive Jet* decision specifically approved this result. 488 F.2d at 759-60. In *Executive Jet* the Supreme Court cited with approval Chapman v. City of Grosse Point Farms, 385 F.2d 962 (6th Cir. 1967) where admiralty jurisdiction was denied over a tort claim resulting from a diving accident similar to that in *Onley.* 409 U.S. at 256.

[23] 528 F.2d 437 (9th Cir. 1975).

obstructed by two dams. While acknowledging the general applicability of the locality plus maritime relationship test, the Ninth Circuit nevertheless denied admiralty jurisdiction and found that the tort did not occur on navigable waters.[24]

Both the *Richards* and *Adams* courts applied the modified jurisdictional test of *Executive Jet.* Each court, however, emphasized a different element of the two pronged inquiry. In *Richards,* the Fourth Circuit's analysis primarily was directed toward resolution of the maritime nexus issue,[25] while in *Adams* the court's finding that the tort occurred on non-navigable waters obviated the need to determine maritime relationship.[26] Despite the difference in analytical emphasis, the Fourth and Ninth Circuits apparently agreed that both locality on navigable waters *and* maritime relationship must be present to satisfy the new jurisdictional standard.[27]

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[24] Absent some statutory exception, admiralty jurisdiction prior to *Executive Jet* extended only to torts occurring on navigable waters. *See The Plymouth,* 70 U.S. (3 Wall.) 20 (1866). *See also* note 98 *infra,* concerning the definition of navigable waters. Despite a lack of clarity in *Executive Jet* with regard to the locality issue, locality on navigable waters remains a component of the new jurisdictional test. Bridwell & Whitten, *supra* note 6, at 761. Both parties in *Executive Jet* argued the locality issue to the Supreme Court. The petitioners, owners of the aircraft, contended that the major damage to the plane resulted from the fact that it sank in Lake Erie, and would not have occurred had the plane crashed on land. Therefore, the tort occurred on navigable waters. The respondents countered that the birds were ingested into the plane's engines while the plane was above the runway, and therefore, the tort occurred on land. 409 U.S. at 266-67. The Court declined to resolve this question of where the tort occurred, noting that "[t]hese are hardly the types of distinctions with which admiralty law was designed to deal." *Id.* at 267. Thus the Court treated maritime relationship as the threshold issue and denied admiralty jurisdiction on that basis without determining whether the tort had a maritime locality.

However, the Ninth Circuit in Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975), took a different approach. The court determined that the waterway on which the tort occurred was not navigable and denied admiralty jurisdiction, noting that its conclusion of non-navigability made consideration of maritime relationship unnecessary. 528 F.2d at 441. The *Adams* court interpreted *Executive Jet* as requiring both locality on navigable waters *and* maritime relationship to sustain admiralty jurisdiction. Since the court found one of the two essential elements lacking, admiralty jurisdiction was denied. The significance of the *Adams* decision lies in the court's definition of navigable waters. *See* text accompanying note 102 *infra.*

[25] 528 F.2d at 746. The locality issue as well as the maritime nexus issue was argued on appeal. Brief for Appellants at 10, Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir. 1975). The Fourth Circuit did not specifically discuss the questions of locality and navigability but did rule that "[b]oth of these occurrences were on navigable waters." *Id.* at 746.

[26] 528 F.2d at 441.

[27] *See* note 24 *supra.* For a discussion of other possible interpretations of the *Executive Jet* test see Bridwell & Whitten, *supra* note 6, at 772-86.

While the Fourth and Ninth Circuits each stressed a different aspect of the two part jurisdictional test, the courts agreed that commercial activity is the cornerstone of admiralty jurisdiction.[28] Both courts noted that the historical purpose and justification for admiralty jurisdiction was the promotion of commercial shipping.[29] Thus, the courts reasoned that when no commercial interest is involved or threatened by tortious activity, no reason exists for the exercise of admiralty jurisdiction. The Ninth Circuit emphasized commercial activity in the context of determining the navigability of a waterway, holding that waters presently devoid of commercial activity are not navigable for purposes of invoking admiralty jurisdiction.[30] Similarly, the Fourth Circuit concluded that traditional maritime activity was commercial in nature, and therefore, only tortious activity having a sufficient relation to maritime commercial interests should be within admiralty jurisdiction.[31] Despite consensus in *Richards* and *Adams* on the relevance of commercial activity to admiralty jurisdictional determinations, the two elements of the *Executive Jet* test, locality on navigable waters and maritime relationship, remain distinct.[32] Each element must be established to invoke federal admiralty jurisdiction under the doctrine of *Executive Jet.*[33]

Although *Executive Jet* established maritime relationship as an element of the new jurisdictional test, the locality requirement had long been a prerequisite of admiralty tort jurisdiction. The locality rule was stated in *The Plymouth*:[34]

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[28] The Ninth Circuit in *Adams* discussed commercial activity, noting that "[c]ommerce for the purpose of admiralty jurisdiction means activities related to the business of shipping." 528 F.2d at 439. Although this definition appears to exclude commercial fishing vessels from admiralty jurisdiction, the preceding sentence of the court's opinion indicates that the exclusion was unintentional. The court there stated that noncommercial sport fishing does not constitute commerce. Thus, by negative implication, commercial fishing would constitute commerce for purposes of admiralty jurisdiction. *Id.*

[29] *See* Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 749 (4th Cir. 1975); Adams v. Montana Power Co., 528 F.2d 437, 439 (9th Cir. 1975).

[30] 528 F.2d at 441.

[31] 528 F.2d at 749.

[32] *See* text accompanying note 30 *supra.* The *Adams* court based its finding of non-navigability on the absence of commercial activity on the portion of the Missouri River where the tort occurred. 528 F.2d at 439. Since the river was completely obstructed by two dams, it no longer formed a link in a commercial highway. Neither did it sustain any local commercial traffic. Therefore, the portion of the river between the two dams was non-navigable. *Id.* at 439-40.

[33] *See* note 24 *supra.*

[34] 70 U.S. (3 Wall.) 20 (1866). The locality rule was first discussed in DeLovio v. Boit, 7 Fed. Cas. 418 (C.C. Mass. 1815) (No. 3,776). At the time of *DeLovio,* the

> Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.[35]

In *Executive Jet*, the Supreme Court acknowledged the frequent application of the locality rule[36] and added that "for the traditional types of maritime torts, the traditional test has worked quite satisfactorily."[37] However, the Court also noted that the strict locality rule presented problems in certain "perverse and casuistic borderline situations."[38] To illustrate the "almost absurd" results produced by rigid adherence to the rule, the Court cited cases in which admiralty jurisdiction was exercised over the claims of swimmers injured by floating objects[39] and waterskiers injured by towing motorboats.[40] In these cases the maritime locality of the tort was clear, yet the activity lacked any connection with "traditional forms of maritime commerce or navigation."[41] While critical of the exercise of admiralty jurisdic-

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concept of navigability was limited to "waters within the ebb and flow of the tide," Thomas v. Lane, 23 Fed. Cas. 957, 960 (C.C. Me. 1813) (No. 13,902). This formulation of the rule was modified in 1851 in Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 233 (1851), eliminating the tidewater limitation. *The Genessee Chief* extended admiralty jurisdiction to all waters of the United States navigable in interstate or foreign commerce. *Id.* at 238. *See* text accompanying notes 102-09 *infra*.

[35] 70 U.S. (3 Wall.) at 36. *The Plymouth* specifically held that injury to land-based persons or property caused by a vessel on navigable waters was not within admiralty jurisdiction. However, this principal was overruled in 1948 by the Admiralty Extension Act, Pub. L. No. 695, 62 Stat. 496 (current version at 46 U.S.C. § 740 (1970)), which provides in part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land.

[36] The Supreme Court referred to its opinion in Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 n.2 (1971), where the Court had cited over forty cases stating and applying the locality rule. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 254 (1972).

[37] 409 U.S. at 254.

[38] *Id.* at 255. The Court also noted the disparate results reached in two factually similar cases involving injury to longshoremen. Smith & Son v. Taylor, 276 U.S. 179 (1928), and Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935). The cases were cited as examples of the problems presented by the strict locality rule. 409 U.S. at 255.

[39] Davis v. City of Jacksonville Beach, 251 F. Supp. 327 (M.D. Fla. 1965) (claim of a swimmer injured by a surfboard held within admiralty jurisdiction).

[40] King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963) (injury to a waterskier held within admiralty jurisdiction). The *Executive Jet* Court also implied that aviation torts fell within this category of borderline jurisdictional problems. 409 U.S. at 261. The Fourth Circuit decision in Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973) is based on the Supreme Court's express disapproval of the *King* case. *See* note 22 *supra*.

[41] 409 U.S. at 255-56.

tion in such situations, the *Executive Jet* Court attributed these incorrect results to a strict reliance on locality as the sole test of admiralty jurisdiction.[42] The Court, therefore, required that, in addition to locality on navigable waters, the tort bear a significant relationship to traditional maritime activity.[43]

The Supreme Court, however, failed to define clearly the phrase 'traditional maritime activity.'[44] Throughout the opinion, commerce and navigation are mentioned conjunctively as elements of traditional maritime concern.[45] Yet, *Executive Jet* does not establish whether both maritime commercial activity and navigation must be present in order to satisfy the maritime nexus test or whether one of those elements alone would be sufficient to demonstrate a traditional maritime activity. The Court found only that the necessary relationship does not exist in the context of aviation torts occurring during intracontinental flight.[46] The broad dictum of *Executive Jet* juxtaposed with its narrow factual holding has resulted in uncertainty regarding the scope of the locality plus test in borderline situations

[42] *Id.* at 261.

[43] The *Executive Jet* Court concluded that the mere fact that a tort occurs on navigable waters is not in itself sufficient to establish its maritime nature. "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268. *See* Bridwell & Whitten, *supra* note 6, at 772-86, where other possible interpretations of *Executive Jet* are discussed.

[44] The Court discussed the types of cases with which admiralty courts traditionally deal, noting that:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

409 U.S. at 269, 270. *See* Note, *Admiralty Jurisdiction Over Pleasure Craft Torts*, 36 Md. L. Rev. 212 (1976).

[45] *See, e.g.*, 409 U.S. at 256, 270.

[46] Although the introductory portion of the *Executive Jet* opinion suggests that the new test is applicable in all maritime tort cases, the holding of the case is narrowly confined to the specific factual question. However, the lower courts have not interpreted the decision as confined to aviation torts. *See* notes 6 & 7 *supra*. *But see* Maryland v. Amerada Hess Corp., 384 F. Supp. 1362 (D. Md. 1973).

involving the activities of pleasure craft.[47]

Pleasure boats generally have been considered vessels in navigation[48] when operated on navigable waters.[49] This characterization has placed the activities of pleasure boaters within admiralty jurisdiction.[50] Nevertheless, pleasure craft do not fit comfortably within the historical framework of admiralty.

The constitutional grant of admiralty jurisdiction to the federal courts[51] was intended to serve the needs of the commercial shipping

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[47] Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir. 1975).

[48] St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir.), *cert. denied,* 419 U.S. 884 (1974). The term vessel is defined at 1 U.S.C. § 3 (1970).

> The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

The broad statutory definition, however, does not require the exercise of admiralty jurisdiction over any particular type vessel. The jurisdictional test, locality plus maritime relationship, is not dependent on the statutory definition of a vessel. Although the involvement of a vessel may serve as some evidence of maritime relationship, Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974), the function of the vessel more reliably indicates the strength of the relationship between an occurrence and traditional maritime activity. *But see* Kayfetz v. Walker, 404 F. Supp. 75 (D. Conn. 1975), where the court sustained admiralty jurisdiction of a claim that arose from the collision of two sailboats taking part in a sporting event. However, the function of pleasure sailboats is at best marginally related to the traditional concerns of admiralty. *See* note 52 *infra.*

[49] *See* note 98 *infra.*

[50] One court has suggested that the mere presence of a structure, technically classified a vessel, on navigable waters is sufficient to sustain admiralty jurisdiction. Luna v. Star of India, 356 F. Supp. 59 (S.D. Cal. 1973) (permanently moored vessel used as museum). *But see* Jiles v. Federal Barge Lines, Inc., 365 F. Supp. 1225 (E.D. La. 1973), where a claim was brought by a workman injured while painting a deactivated steamboat moored in navigable waters. The *Jiles* court denied admiralty jurisdiction on the grounds that the structure was not a vessel and the tort complained of was not sufficiently related to traditional maritime activity. *Id.* at 1230-31.

[51] The boundaries of federal amiralty jurisdiction are circumscribed by the constitutional grant of jurisidction to the federal courts. U.S. CONST. art. III § 2. Congress "cannot reach beyond the constitutional limits which are inherent in admiralty and maritime jurisdiction." E. JHIRAD & A. SANN, 1 BENEDICT ON ADMIRALTY 7-28, 7-29 (7th ed. 1974). However, jurisdictional limits are difficult to define. The Supreme Court described the constitutional boundaries of federal admiralty jurisdiction in Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924):

> [Nevertheless] there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.

The suggestion in the quoted passage that Congress may, within limits, alter the scope of admiralty jurisdiction, might supply an alternative solution to the problem of pleasure boating in admiralty. The Fourth Circuit suggested in *Richards* that Con-

industry.[52] The grant of jurisdiction established a single industry commercial court applying uniform rules of law for the conduct of the shipping business.[53] Uniformity and predictability of law are essential to the protection of merchants involved in maritime trade and are necessary to foster international trade.[54] In addition, regulation of international shipping may relate to questions of foreign policy, requiring the vesting of admiralty jurisdiction in the national government.[55] Considerations of international trade and foreign policy were of great concern to the Framers of the Constitution.[56]

Pleasure boating, however, did not exist on any significant scale until long after the adoption of the Constitution. Thus, rules and procedures of admiralty courts developed with reference to commercial aspects of navigation and without regard to pleasure craft operations.[57] Nevertheless, jurisdiction of claims arising from occurrences on navigable waters traditionally has been exercised by admiralty courts without reference to the type of vessel involved.[58] Under the strict locality test, all torts occurring on navigable waters were cog-

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gress restrict admiralty jurisdiction to exclude pleasure craft, 528 F.2d at 748, presumably on the ground that pleasure craft do not fall clearly within that jurisdiction.

[52] *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 670 (1963) [hereinafter cited as Stolz]. Professor Stolz concluded his discussion of the historical purposes of admiralty jurisdiction:

> Commerce and uniformity go together. There is virtue in having the same rules applied to ships and their cargoes moving from port to port: uniformity promotes the free movement of trade by increasing the confidence of merchants in their ability to conduct business successfully.

Id. at 671. *See also* Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir. 1975).

[53] Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 260 (1950).

[54] The Ninth Circuit in *Adams* similarly defined the purpose of admiralty jurisdiction as the creation of a uniform body of law to regulate the activities of the shipping industry and to accommodate the interests of those engaged in the industry and those who come in contact with it. Adams v. Montana Power Co., 528 F.2d at 439 n.1.

[55] Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 747 (4th Cir. 1975). The *Richards* court cited both Stolz, *supra* note 52, at 666-719, and G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY (2nd ed. 1975) [hereinafter cited as GILMORE & Black] chapter 1, as authority for its discussion of the history of admiralty jurisdiction.

[56] *See* Stolz, *supra* note 52, at 669-70.

[57] The Plymouth, 70 U.S. (3 Wall.) 20 (1866); *see* note 51 *supra*.

[58] *See, e.g.*, Levinson v. Deupree, 345 U.S. 648 (1953). In *Levinson*, a passenger on a small pleasure boat on the Ohio River was killed in a collision between that craft and another pleasure boat. The question before the Court concerned the defective appointment of an administrator, but the Court assumed, without discussion, that admiralty jurisdiction was invoked properly.

nizable in admiralty, whether involving merchant ships or pleasure boats.[59] The *Executive Jet* decision, however, requires a finding of maritime relationship in every case, and circuit courts are uncertain whether pleasure craft satisfy this requirement. Courts generally have resolved this uncertainty by finding admiralty jurisdiction.[60]

The Fourth Circuit sustained admiralty jurisdiction in *Richards*[61] despite the court's opinion that the torts involved were essentially local in character[62] and did not require the expertise of the admiralty court.[63] Noting that uniformity and predictability of law are the historical justifications for admiralty jurisdiction,[64] the court reasoned that pleasure craft torts ordinarily do not require such treatment.[65] The Fourth Circuit noted that most tortious activities of pleasure craft are not essentially different from tort claims adjudicated in state court and are of no greater interest to the federal government.[66] Every state has developed well defined principles of tort law which are an obvious, though not necessarily uniform,[67] body of law available as a substitute for admiralty principles. Thus, the denial of admiralty jurisdiction in pleasure boating cases where the dispute is primarily of local concern,[68] would result in state court application of state law.[69] Nevertheless, the *Richards* court did conclude that admi-

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[59] *See* text accompanying note 35 *supra*.

[60] *See* text accompanying note 6 *supra*.

[61] 528 F.2d 745 (4th Cir. 1975).

[62] The tortious activity involved in many pleasure craft cases is 'local' in the sense that resolution of these controversies may not demand uniform national treatment. All of the states have developed rules of tort law to govern controversies between their citizens, and, absent some overriding federal interest in the outcome of such disputes, the state courts and legislatures should be permitted to resolve them. Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 746-47 (4th Cir. 1975).

[63] As the Fourth Circuit noted in *Richards,* state court systems "are as capable of dealing with controversies arising out of a collision of two small motorboats as with controversies arising out of the collision of two automobiles on an interstate highway." *Id.* at 747, citing Stolz, *supra* note 52.

[64] *Id.*

[65] *Id. See* note 62 *supra*.

[66] 528 F.2d 745, 746 (4th Cir. 1975).

[67] In some states, for example, contributory negligence is a complete bar to a tort recovery while other states and admiralty courts apply the doctrine of comparative negligence. *Compare,* Norfolk & Western Ry. v. Gilliam, 211 Va. 542, 178 S.E.2d 499 (1971) (plaintiffs' recovery barred by contributory negligence) *with* Li v. Yellow Cab Co., 13 Cal.3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975) (California doctrine of contributory negligence overruled and comparative negligence standard adopted).

[68] *See* note 62 *supra*.

[69] The constitutional grant of federal admiralty jurisdiction, U.S. CONST., art. III § 2, was first implemented by the Judiciary Act of 1789 and is presently codified at 28

ralty jurisdiction was appropriate in some pleasure boating cases where oceangoing yachts and small craft are operated "sufficiently far offshore to be without the jurisdiction of any state."[70] Since the boating activity in such cases does not occur within the territorial waters of any state, the activity is not of merely local concern and federal admiralty jurisdiction is appropriate.[71]

In addition to tortious activity occurring outside state territorial jurisdiction, the Fourth Circuit recognized a federal interest in the enforcement of uniform Rules of the Road.[72] When pleasure craft are operated on commercially navigable waters,[73] the federal government has a legitimate interest in requiring that they conform to the same navigational and safety rules as commercial craft operating on the same waters.[74] While uniform rules of navigation clearly are essential for commercial craft and pleasure boats alike, the *Richards* court noted that such rules can be interpreted and enforced by state courts as well as federal judges.[75]

Despite the Fourth Circuit's reluctance to sustain admiralty juris-

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U.S.C. § 1333 (1970). That section grants the district courts exclusive jurisdiction of any civil case of admiralty, "saving to suitors in all cases all other remedies to which they are otherwise entitled." This clause permits a claimant, in an in personam action, to elect whether to prosecute his suit in admiralty or in a civil action in state or federal court. *See* GILMORE & BLACK, *supra* note 55, at 37-40.

In cases currently brought in state court under the "saving to suitors" clause, 28 U.S.C. § 1333(1)(1970), the state courts must apply federal substantive law. Nonetheless, state courts may supplement the federal substantive law by applying state statutory and decisional law, where such rules do not conflict with admiralty principles and are not disruptive of the required uniformity of federal maritime law. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[70] 528 F.2d at 748.

[71] *Id.* In cases where the tort occurred on the high seas no forum other than the federal courts can claim a legitimate interest in the resolution of the controversy.

[72] *Id.* at 747. The Rules of the Road are promulgated by Congress, *see* note 74 *infra*, and cover such subjects as turning and maneuvering of vessels to avoid collision, safety equipment requirements, and signal lights to be carried aboard vessels. GILMORE & BLACK, *supra* note 55, at 488-92. The Coast Guard has the power to supplement these rules by the issuance of regulations. 33 U.S.C. §§ 157, 243 (1970).

[73] *See* text accompanying notes 88-92 *infra*. The phrase commercially navigable waters here refers to waterways presently supporting commercial traffic.

[74] The United States has four sets of navigational rules now in force. The International Rules, 33 U.S.C. §§ 1051-1094 (1970); The Great Lakes Rules, 33 U.S.C. §§ 241-295 (1970); The Western Rivers Rules, 33 U.S.C. §§ 301-356 (1970); The Inland Rules, 33 U.S.C. §§ 151-232 (1970). The areas of coverage of the four sets of rules are precisely defined and charts furnish exact information as to where coverage areas begin and end. Variations among the four sets of rules are minor. GILMORE & BLACK, *supra* note 55, at 488-92.

[75] 528 F.2d at 747.

diction in *Richards,* the court believed that it could not deviate from the "settled course of decision in the Supreme Court as well as in the lower federal courts."[76] Other circuits, however, have not shared the *Richards* court's reluctance to reach similar results.[77] In *Kelly v. Smith,*[78] the Fifth Circuit sustained admiralty jurisdiction over the claims of plaintiffs injured in an exchange of rifle fire while fleeing a Mississippi River island hunting preserve in their small pleasure boat.[79] The court applied the locality plus test of *Executive Jet,* but discerned from that opinion and its own Fifth Circuit precedent[80] that the sufficiency of a maritime relationship depends upon:

> "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law."[81]

The court applied these criteria and found that the pilot of the boat, who was responsible for its safe navigation, was the party injured; the vehicle involved was a boat used for transportation on the river, a traditional role of vessels; and the instrumentality of injury was a rifle which is not so "inherently indigenous to land as to preclude any maritime connection."[82] The Fifth Circuit also concluded that admiralty traditionally had been concerned with furnishing remedies to those injured while traveling navigable waters.[83] Thus, the court concluded that, as a matter of policy, federal courts should exercise jurisdiction over all tortious conduct that presents a potential danger to maritime commerce.[84]

The *Kelly* court did not indicate that the exercise of admiralty jurisdiction was an undesirable result required by *Executive Jet.* Nor did the court find any compelling state interest in the resolution of the controversy, noting that "the federal interest in protecting navigation on the Mississippi River overrides any considerations of federal-state comity or conflicts of interest."[85] In contrast to the

[76] *Id.* at 748. *See* note 12 *supra.*

[77] *See* notes 6 & 7 *supra.*

[78] 485 F.2d 520 (5th Cir. 1973).

[79] *Id.* at 521.

[80] Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (plaintiff injured in an automobile accident that occurred on a floating pontoon in the Mississippi River used as a ferry boat dock; admiralty jurisdiction was denied). *See* 485 F.2d at 525.

[81] *Id.*

[82] *Id.* at 526.

[83] *Id.*

[84] *Id.*

[85] *Id.* The dissent disagreed with the majority on the question of state versus

Richards decision, the Fifth Circuit was convinced of the need for national uniformity of law in cases involving pleasure boats operated on commercially navigable waterways. Since the tortious activity in *Kelly* took place on the Mississippi River, the Fifth Circuit had no difficulty in supporting a finding of locality on navigable waters. The portion of the river on which the injury occurred was traveled regularly by commercial craft,[86] and the court concluded that a federal interest exists in any activity which may affect interstate commerce.[87]

Other circuits have followed the rationale of the *Kelly* decision. In *St. Hilaire Moye v. Henderson,*[88] the Eighth Circuit considered a claim arising from the alleged negligence of a motor boat operator resulting in injury to a passenger. The accident occurred on a navigable portion of the Arkansas River.[89] The court reviewed post-*Executive Jet* decisions which applied the maritime nexus standard and concluded that "[t]he use of a waterborne vessel on navigable waters presents a case falling appropriately within the historical scope and design of the law of admiralty."[90] The opinion expressed approval of the criteria established in *Kelly,*[91] but did not specifically apply those standards. Rather, the court assumed that noncommercial navigation on navigable waters presents a potential danger "to the operation of vessels which are engaged in commerce on those waters."[92] The opinion of the Eighth Circuit was not limited strictly to the facts of the case, but concluded that all vessels, regardless of size and commercial or recreational character, meet the maritime relationship test when operated on navigable waters.[93]

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federal interest. *Id.* at 527 (Morgan, J., dissenting). *See* note 87 *infra.*

[86] 485 F.2d at 525.

[87] *Id.* at 526. The dissenting opinion in *Kelly, id.* at 527 (Morgan, J., dissenting), indicated that the majority's emphasis on potential danger to commerce on the Mississippi River, created by tortious activity, obscured the facts of the case. There was no evidence that commercial navigation was, in fact, endangered by the conduct of the parties to the law suit. The focus of disagreement concerns whether the exercise of admiralty jurisdiction under the *Kelly* facts furthers the acknowledged federal interest in protecting maritime commerce. The majority concluded that the potential threat to commerce on the river justified the exercise of admiralty jurisdiction. 485 F.2d at 526. The dissent, however, questioned both the existence of a potential threat, and the majority's preference for a federal rather than a state remedy. *Id.* at 527-28 (Morgan, J., dissenting).

[88] 496 F.2d 973 (8th Cir.), *cert. denied,* 419 U.S. 884 (1974).

[89] 496 F.2d at 975.

[90] *Id.* at 979.

[91] *Id.* at 978-79.

[92] *Id.* at 979.

[93] *Id.* The *St. Hilaire Moye* court, like the *Kelly* court was concerned with a potential danger to commercial interests.

The issue of navigability was treated as a threshold question by the Ninth Circuit in *Adams.*[94] Nevertheless, the *Adams* court indirectly considered the relationship of pleasure craft with traditional admiralty concerns as an essential element in determining whether the locality of a tort is on navigable waters. The Ninth Circuit determined that the pleasure boat tort had occurred on a non-navigable portion of the Missouri River obstructed by two dams,[95] and denied admiralty jurisdiction.[96] The court noted that the obstructed portion of the river supported only sport fishing, pleasure boating and waterskiing.[97] While acknowledging the navigability of the Missouri River for commerce clause purposes,[98] the court distinguished the purposes served by that clause and those served by admiralty jurisdiction.[99] While the commerce power was designed, "to preserve and protect the nation's waterways which, in their *natural condition* are navigable in interstate commerce,"[100] the court concluded that the definition of navigability in admiralty jurisdiction need not be the same.[101] Thus, the Ninth Circuit did not consider directly the applicability of maritime relationship, but did determine in the context of navigability, that admiralty jurisdiction should extend only to those waterways which, in their present condition, either sustain or could sustain commercial traffic.[102]

The traditional admiralty rule for determining the navigability of

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[94] 528 F.2d 437 (9th Cir. 1975).

[95] *Id.* at 439. The portion of the river on which the accident occurred is twenty five miles long and is located between Hauser Dam and Holter Dam. *Id.*

[96] *Id.* at 441.

[97] The court concluded that "[n]either non-commercial fishing nor pleasure boating nor waterskiing constitutes commerce" in the admiralty context. *Id.* at 439. *See* note 28 *supra.*

[98] Congress has the power under the commerce clause, U.S. CONST. art. I § 8 cl. 3, to regulate those waterways of the United States which are navigable in interstate or foreign commerce. Any waterway that is used or susceptible of being used in its ordinary condition as a highway of commerce, is navigable for commerce clause purposes. *See* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); note 103 *infra.* Subsequent obstruction of a waterway once found to be navigable, does not alter that status. Economy Light & Power Co. v. United States, 256 U.S. 113, 118 (1921). Further, waterways may be found navigable under the commerce clause even if some artificial improvements are required to render the waterway suitable for interstate traffic. United States v. Appalachian Power Co., 311 U.S. 377, 407 (1940). *See also,* Guinn, *An Analysis of Navigable Waters of the United States,* 18 BAYLOR L. REV. 559 (1966).

[99] 528 F.2d at 438-39.

[100] *Id.* at 440 (emphasis added).

[101] *Id.* at 440-41.

[102] *Id.* Under the Ninth Circuit's approach, the fact that a waterway in the past had been declared navigable would not be controlling. *See* note 98 *supra.*

a waterway had been a commerce clause distinction between navigable waters of the United States within federal admiralty jurisdiction and state navigable waters over which the state courts exercised jurisdiction.[103] Commerce clause power and admiralty jurisdiction are no longer co-extensive,[104] and navigability for purposes of admiralty jurisdiction may be determined independently from commerce clause considerations.[105] Thus, while a waterway once declared navigable under the commerce clause remains navigable despite subsequent obstruction,[106] the admiralty definition of navigability could eliminate admiralty tort jurisdiction on that waterway when an obstruction results in elimination of commercial traffic.[107] Such a defini-

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[103] *See* note 98 *supra*. The rule defining navigability was stated in *The Daniel Ball:*

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1870).

[104] In re Garnett, 141 U.S. 1 (1891).

[105] 7A MOORE'S FEDERAL PRACTICE ¶ .200[3], at 2071-78 (2d ed. Supp. 1975) [hereinafter cited as MOORE'S].

[106] *See* note 98 *supra*.

[107] The navigability of the waterway on which the tort occurs also is the threshold jurisdictional question in proceedings under the Limitation of Liability Act. 46 U.S.C. §§ 183-189 (1970). This statute permits the owner of any vessel to limit his liability for any injury, damage, or loss "occasioned or incurred, without the privity or knowledge of such owner or owners. . .[to] the value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. § 183(a)(1970). The act was passed in 1851 to insure that the American shipping industry would not be at a competitive disadvantage with foreign shipping interests. 7A MOORE'S, *supra* note 105, ¶ .215[5] at 2401-09 (2nd ed. 1976); Petition of Reading, 169 F. Supp. 165, 167 (N.D.N.Y. 1958), *aff'd*, 271 F.2d 959 (2nd Cir. 1959). Since commercial navigation on inland waterways was minimal when the statute was first enacted, the original provisions applied only to oceangoing vessels and specifically excluded "any vessel of any description whatsoever, used in rivers or inland navigation." Act of March 3, 1851, ch. 43,§ 7, 9 Stat. 635. However, when the volume of inland commercial shipping increased the act was amended to "apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation . . . ." Act of June 19, 1886, ch. 421, § 4, 24 Stat. 80.

Since the original purpose and sole justification of the Limitation of Liability Act was the protection of commercial interests, granting the right of limitation to pleasure

tion of navigable waters for admiralty purposes is consistent with the

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boat owners seems incongruous. Nevertheless, courts generally have construed the term "vessel" broadly to include pleasure as well as commercial craft. *See, e.g.*, Feige v. Hurley, 89 F.2d 576 (6th Cir. 1937). Numerous cases have allowed pleasure boat owners to limit their liability, provided however, that the occurrence is without the privity or knowledge of the owner. *See, e.g.*, Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975) (owner of a thirty foot sailboat was permitted to limit his liability for injury to passengers which occurred without his privity or knowledge); Application of Theisen, 349 F. Supp. 737 (E.D.N.Y. 1972) (court acknowledged the applicability of the statute to pleasure craft, but refused to allow limitation on the ground that the tort was within the privity or knowledge of the boat owner); Petition of Porter, 272 F. Supp. 282 (S.D. Tex. 1967) (court acknowledged the applicability of the limitation statute to small pleasure boats). *See also*, Harolds, *Limitation of Liability And Its Application to Pleasure Boats*, 37 TEMP. L.Q. 423 (1964) [hereinafter cited as Harolds]. An owner who operates his own pleasure boat cannot claim lack of privity or knowledge and is not entitled to limitation. Professors Gilmore and Black have noted that

> [n]o theory can justify the results reached in Coryell v. Phipps [and other cases], under which the owner of a yacht or speedboat, who is provident enough to hire someone else to run the boat for him is granted a general license to kill and destroy.

GILMORE & BLACK, *supra* note 55, at 882. Such criticism of application of the act to pleasure boats is now commonplace. *See, e.g.*, Harolds,*supra*, at 430; 7A MOORE'S, *supra* note 105, ¶ .215[5] at 2408; Stolz, *supra* note 52, at 709; Note, *Shipowner's Limited Liability*, 3 COLUM. J. OF L. & SOC. PROB. 105 (1967). Commentators emphasize that the act's purpose of fostering commercial shipping is not promoted by allowing pleasure boat owners to limit liability; nor does limitation allow adequate compensation to those injured by the tortious conduct of pleasure boaters. Thus, many commentators have urged repeal of the act or, absent Congressional action, a narrow construction of the term "vessel" to exclude pleasure craft. *See* GILMORE & BLACK, *supra* note 55, at 882-83; 7A MOORE'S, *supra* note 105, ¶ .215[5] at 2408-09; Stolz, *supra* note 52, at 661.

However, even as the term vessel is presently construed, not all pleasure boat owners are entitled to limitation. The owner seeking to limit liability must establish that the jurisdiction of the admiralty court was properly invoked. Thus, in tort claims the owner must establish that the situs of the tort was on navigable waters. GILMORE & BLACK, *supra* note 55, at 877-83.Under a broad definition of navigability such as that of *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), *see* note 103 *supra*, limitation may be granted to those pleasure boat owners whose craft are operated on completely obstructed waterways supporting no commercial activity. Application of the *Adams* navigability test, however, would exclude noncommercial waterways from admiralty jurisdiction and deny a right of limitation to the owners of pleasure craft operated on non-commercial waters. This approach was followed in George v. Beavark, 402 F.2d 977 (8th Cir. 1968). In that case, owners of a thirty-eight foot pleasure boat sought to limit their liability for damage to other pleasure boats and a boat dock which resulted from a fire on board their boat. At the time of the fire, the boat was moored on Beaver Lake, a manmade lake in Northwest Arkansas formed by a dam on the White River. The court denied the petition for limitation on the grounds that Beaver Lake was non-navigable and therefore, the admiralty court lacked jurisdiction. *Id.* at 981. *See also* Petition of Madsen, 187 F. Supp. 411 (N.D.N.Y. 1960).

Executive Jet mandate to consider the traditional concerns of maritime law.[108]

The *Adams* and *Richards* courts agree that traditional concerns of admiralty are commercial shipping and navigation of commercial craft on the nation's waterways. These decisions imply that when commercial activity,[109] trade and transportation, are absent, the federal government ceases to have an overriding interest in the activity for purposes of admiralty law uniformity.[110] Rather, the state's interest in providing a forum for resolution of legal disputes within its borders becomes predominant.[111] This lack of federal interest prompted the *Adams* court to exclude a pleasure boating tort from admiralty by relating the admiralty definition of navigability to the historical purposes of that jurisdiction.

Although application of the *Adams* navigability test might have changed the result in the Virginia case decided in *Richards*,[112] the redefinition of navigability to exclude non-commercial waters from admiralty does not solve entirely the problem of pleasure boating within admiralty jurisdiction. Many pleasure craft torts occur on waterways supporting commercial traffic. In such situations, the maritime relationship test must determine whether admiralty juris-

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[108] Waterways that support no commercial activity are non-navigable in admiralty, Adams v. Montana Power Co., 528 F.2d 437, 439 (9th Cir. 1975), and no tort occurring on non-commercial waterways could be sufficiently related to traditional maritime activity to justify admiralty jurisdiction. Richards v. Blake Builders Supply, Inc., 528 F.2d 745 (4th Cir. 1975). When the tort occurs on commercially navigable waters, however, the question of maritime relationship remains. If the particular occurrence itself involved some relationship to commercial activity, then admiralty jurisdiction is appropriate. *See* Stolz, *supra* note 52, at 671. If the occurrence did not involve any commercial interest, either directly or by way of an actual threat, and the claim arose within a state's territorial jurisdiction, then admiralty jurisdiction need not be exercised.

[109] *See* note 28 *supra*. *See also* Kelly v. Smith, 485 F.2d 520, 526 (Morgan, J., dissenting 1973).

[110] Professor Stolz expressed his objection to pleasure boating in admiralty:

> The chief objection to the application of admiralty law to pleasure boating is that it implicitly prohibits the exercise of state legislative power in an area in which the local legislatures have generally been thought competent and in which Congress cannot be expected either to be interested or to be responsive to local needs.

Stolz, *supra* note 52, at 664.

[111] *See* Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 747 (4th Cir. 1975).

[112] *See* notes 15 & 16 *supra*. If Lake Gaston, the situs of the tort in the Virginia case, was not used for the transportation of goods or passengers, then the *Richards* court could have adopted a definition of navigability similar to that in *Adams*. The Cape Fear River, involved in the North Carolina case, apparently sustained some commercial traffic. 528 F.2d at 747.

diction should be exercised.[113] Most circuit courts, upon looking for a maritime relationship in pleasure boating, have interpreted traditional maritime activity to include all occurrences involving the navigation of vessels.[114] This definition, however, does not adequately consider the history and function of admiralty courts[115] in exercising jurisdiction over maritime shipping and commercial trade.[116] Additionally, the courts have minimized the often predominant state interests in legislative and judicial solution of the problems of pleasure boating.[117]

As the *Richards* opinion suggests, the Supreme Court has not overruled earlier precedents for the exercise of admiralty jurisdiction over pleasure craft torts.[118] Rather, the Court's decision in *Executive Jet* has modified the strict locality test which permitted the exercise of admiralty jurisdiction in previous pleasure boating cases. The Supreme Court implied in *Executive Jet* that admiralty law was designed to serve an essentially commercial purpose: to provide a specialized body of law to resolve the disputes of those engaged in the business of commerce by water.[119] While all tortious activity of vessels on navigable waters initially presents a jurisdictional question, those cases having no connection with the historical function of admiralty should be excluded. In situations arising on non-commercial waterways, the requirement of locality on navigable waters, as defined for admiralty purposes, will eliminate the torts of pleasure craft from admiralty jurisdiction.[120] Those pleasure craft torts occurring on com-

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[113] The Fourth Circuit in *Richards* suggested:

> Perhaps what is needed is congressional attention to the matter, for the Congress, after hearings, could tailor the jurisdiction to the need, relinquishing to the states and their judicial systems those controversies better handled there while retaining for federal admiralty jurisdiction those controversies for which it is better equipped.

528 F.2d at 748 (footnote omitted).

[114] Only *Richards* and *Adams* have suggested that "traditional maritime activity" should be interpreted more narrowly. The Fifth Circuit in *Kelly* implied that when the instrumentality involved in a tortious event was a vessel the maritime relationship was sufficient. 485 F.2d at 525-26.

[115] *See, e.g.,* St. Hilaire Moye v. Henderson, 496 F.2d 979 (8th Cir.), *cert. denied,* 419 U.S. 884 (1974).

[116] *See, e.g.,* Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); St. Hilaire Moye v. Henderson, 496 F.2d 979 (8th Cir.), *cert. denied,* 419 U.S. 884 (1974).

[117] *See* notes 62 & 110 *supra.*

[118] Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 748 (4th Cir. 1975).

[119] 409 U.S. at 270. *See* note 9 *supra.*

[120] Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975).

mercially navigable waters must be considered in light of the historical design of admiralty jurisdiction to determine whether the exercise of jurisdiction furthers the commercial interests which admiralty courts were created to serve. A pragmatic insistence on the existence of a relationship between tortious conduct and the historical purposes of admiralty law will allow realistic solutions to borderline jurisdictional problems.

MARY KAY DEPOY