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Ii. Admiralty

requirements a lenient interpretation which will result in courts upholding many agency disclosure regulations that courts probably would not uphold under a stricter interpretation.[76] Thus, a lenient interpretation of the "unless authorized by law" exception may have the effect of limiting the ability of submitters to prevent disclosure of confidential business information.[77] In addition, because the Fourth Circuit suggested it will require a reasoned and detailed basis for an agency's decision to disclose information exempt under the FOIA, judicial review of the decision will most likely be limited to the administrative record reducing a court's discretion to reverse the decision to disclose.[78] Thus, the Fourth Circuit's decision in *General Motors* may not substantially improve the ability of submitters to prevent agency disclosure of confidential business information.

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II. ADMIRALTY

A. Admiralty Jurisdiction

The federal courts possess exclusive jurisdiction over all admiralty and maritime cases.[1] The limits of admiralty jurisdiction, however, have advanced and receded over the years, following the ebb and flow of judicial and legislative decision-making.[2] Traditionally, federal courts ex-

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controlling statute on release of the information "unless authorized by law" under some other statute or agency regulation. *See* 18 U.S.C. § 1905 (1976); Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (disclosure of exempt information under FOIA which violates § 1905 is abuse of discretion by agency under § 706(2)(A) of APA).

[76] *See* text accompanying notes 63-67 *supra* (lenient interpretation of "unless authorized by law" exception of § 1905 and effect on validity of agency disclosure regulations).

[77] *See* note 68 *supra* (submitter's alternatives to prevent disclosure of confidential business information once court determines disclosure of information by agency is authorized by law).

[78] *See* text accompanying notes 48-54 *supra* (court's decision requiring reasoned and detailed basis for agency decision to disclose and provisions of section 706(2)(A) and (F)).

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[1] 28 U.S.C. § 1333(1) (1976). The federal courts derive their powers to hear all cases of admiralty and maritime jurisdiction from constitutional grant and statutory implementation. *Id.*; U.S. CONST. art. III, § 2. The Judiciary Act of 1789 provided federal district courts with exclusive original jurisdiction of all civil causes involving admiralty matters. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77 (current version at 28 U.S.C. § 1333(1) (1976)). Further, the jurisdictional grant carries with it a rulemaking power that permits the creation of substantive rules of law by the federal courts and preempts state law when exercised. Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-9, at 18-21 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

[2] *See* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1214-15 (1954). Congress frequently has over-

tended admiralty jurisdiction to all torts that occurred on the high seas or the navigable waters of the United States.[3] The requirement that a

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ruled judicially-created admiralty rules that affected seamen harshly. For instance, early admiralty courts held that there was no recovery of damages for death resulting from a maritime tort consummated on navigable waters. *See* The ALASKA, 130 U.S. 201, 209 (1889); The HARRISBURG, 119 U.S. 199, 213 (1886), *overruled*, 398 U.S. 409 (1969). In 1920, however, Congress extended admiralty jurisdiction to cover actions for wrongful death by promulgating the Death on the High Seas Act. Act of March 30, 1920, Pub. L. No. 66-165, ch. 111, § 1, 41 Stat. 537 (current version at 46 U.S.C. §§ 761-67 (1976)); *see* 2 M. NORRIS, THE LAW OF SEAMEN §§ 653-55 (3d ed. 1970) [hereinafter cited as THE LAW OF SEAMEN].

Courts additionally did not permit seamen to recover damages for injuries sustained through the negligence of any member of the crew. *See* The OSCEOLA, 189 U.S. 158, 175 (1903). Congress abolished the defense of the common-law fellow-servant rule by passing § 33 of the Merchant Marine Act of June 5, 1920, commonly called the Jones Act. Act of June 5, 1920, ch. 250, Pub. L. No. 66-261, § 33, 41 Stat. 1007 (current version at 46 U.S.C. § 688 (1976)); *see* THE LAW OF SEAMEN, *supra*, §§ 657-704.

Admiralty courts also did not entertain jurisdiction over injuries caused by a vessel in navigable waters and consummated on land. *See* Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946). Congress, however, enacted statutory provisions in 1948 that expanded admiralty jurisdiction to cover damages consummated on land by a vessel in navigable waters. Act of June 19, 1948, Pub. L. No. 80-694, ch. 526, 62 Stat. 496 (current version at 46 U.S.C. § 740 (1976)); *see* THE LAW OF SEAMEN, *supra*, § 6, at 14-16.

The courts have often reflected a paternalistic view toward seamen because they were largely at the mercy of their employers. *See* 38 WASH. & LEE L. REV. 469, 470 n.13 (1981). A separation of powers problem, however, created an element of judicial restraint. *See* note 4 *infra*. The courts, consequently, often rendered apparently harsh decisions to encourage the statutory creation of rights. *See, e.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (Congress should supplant state compensation with uniform federal scheme); Victory Carriers, Inc. v. Law, 404 U.S. 202, 215-16 (1971) (Congress has power to create federal remedy when state laws provide inadequate benefits for injured seamen); Turner v. Transportacion Maritima Mexicana, 44 F.R.D. 412, 420 (E.D. Pa. 1968) (court urged Congress to reevaluate issue of exclusive remedy under § 905(a) of the Longshoremen's and Harbor Workers' Compensation Act). *See also* note 4 *infra*.

[3] *See* GENESSEE CHIEF v. Fitzhugh, 53 U.S. (12 How.) 233, 242 (1851). The *Fitzhugh* Court extended admiralty jurisdiction to all waters of the United States navigable in foreign or interstate commerce. *Id.* at 240-41. For a definition of navigable waters, *see* note 28 *infra*. In The PLYMOUTH, 70 U.S. (3 Wall.) 20 (1865), the Supreme Court interpreted the strict locality test as equating the situs of the tort with the situs of the injury. *Id.* at 27-29. The strict locality test resulted in numerous inconsistent and inequitable results. *See* note 38 *infra*. Nevertheless, the Supreme Court upheld the use of the strict locality test as recently as 1971. Victory Carriers, Inc. v. Law, 404 U.S. 202, 204 (1971) (admiralty jurisdiction denied longshoremen in suits for injury sustained while operating defective fork lift on dock). *But see* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); note 7 *infra*.

In contrast to the rule governing jurisdiction over admiralty torts, the availability of admiralty jurisdiction in maritime contractual matters requires a conceptual connection with maritime commerce or navigation. *See* Kossick v. United Fruit Co., 365 U.S. 731, 736 (1961); Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932). Consequently, neither the place of the execution nor the place of performance of a contract determines the existence of admiralty jurisdiction. Pierside Terminal Operators, Inc. v. M/V FLORIDIAN, 423 F. Supp. 962, 967-68 (E.D. Va. 1976). Rather, the subject matter of the contract determines whether admiralty jurisdiction arises. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 40-41 (1943).

The separate treatment of actions based on contract theories and actions based on

tort occur on the high seas, however, denied admiralty jurisdiction over torts that involved maritime activities such as longshoring and harbor work, which often occur on land.[4] On the other hand, the "situs" requirement allowed jurisdiction over numerous activities unrelated to maritime commerce, such as overseas air travel, swimming, and pleasure-boating.[5] To compensate for this disparity, the Supreme Court, in *Ex-*

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tort theories occasionally gives rise to inconsistent results in identical fact situations. *See, e.g.*, Dudley v. Bayou Fabricators, Inc., 330 F. Supp. 788, 790 (S.D. Ala. 1971), *aff'd sub nom.* Dudley v. Smith, 504 F.2d 979 (5th Cir. 1974) (claim for faulty construction of vessel within admiralty jurisdiction if based on tort, but not if based on contract); *In re* Alamo Chem. Transp. Co., 320 F. Supp. 631, 633-34 (S.D. Tex. 1970) (admiralty courts recognized strict liability sounding in tort, but not if same action based on contract warranty theory). *See* McCune, *Maritime Products Liability*, 18 HAST. HASTINGS. L.J. 831, 861-62 (1967) (confusion as to breach of warranty sounding in contract or strict liability in tort).

[4] *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 204 (1971) (admiralty jurisdiction denied longshoreman for injury sustained on pier); Nacirema Operating Co. v. Johnson, 396 U.S. 212, 214 (1969) (admiralty jurisdiction denied longshoreman injured on shore while attaching cargo to ship's cranes). Judicial restraint on application of state compensation acts to longshoremen injuries originated in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). *Jensen* held that a state was without power to extend a compensation remedy to a longshoreman injuried on the gangplank between the ship and the pier. *Id.* at 217-18. The *Jensen* decision left longshoremen injured on the seaward side of the pier without a compensation remedy, while longshoremen injured on the pier enjoyed the protection of state compensation acts. State Indus. Comm'n. v. Nordenholt Corp., 259 U.S. 263, 272-73 (1922). Congress twice granted the states the power to extend state court jurisdiction over maritime injuries consummated on navigable waters. *See* Act of Oct. 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634. The Supreme Court, however, struck down each statute as an unlawful delegation of federal legislative power. Washington v. W. C. Dawson & Co., 264 U.S. 219, 225-28 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164-66 (1920). As a consequence, Congress passed the original Longshoremen's and Harbor Workers' Compensation Act (LHWCA). 33 U.S.C. §§ 901-950 (1976). LHWCA originally did not extend coverage to longshoremen whose injuries occurred on the landward side of the *Jensen* line, *see* note 4 *supra*; *see, e.g.*, Swanson v. Marra Bros. 328 U.S. 1, 7 (1946) (longshoreman injured on dock during course of employment not covered by LHWCA); Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 250 (1941) (LHWCA only applies when injury occurs on navigable waters). In 1972, however, Congress amended the LHWCA in an attempt to mitigate *Jensen* and its progeny by extending coverage to certain land-based injuries. Act of Oct. 27, 1972, Pub. L. No. 92-576, § 1, 86 Stat. 852 (codified at 33 U.S.C. §§ 902, 903). The amended coverage plan that Congress adopted contains a two-step test. *See* Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments*, 55 TEX. L. REV. 99, 116 (1976) [hereinafter cited as *1972 Amendments*]. To receive LHWCA benefits, the worker must sustain injuries while engaged in a type of work that qualifies as maritime employment. *See* 33 U.S.C. § 902(3) (1976). Maritime employees include longshoremen, shipbuilders, ship repairmen, and shipbreakers. *Id.* Additionally, before an injury falls under the ambit of LHWCA, the injury must occur within the expanded navigable waters limit. *Id.* §§ 902(4), 903(a); *see 1972 Amendments*, *supra*, at 103. The amendments to LHWCA expanded the navigable waters limit to include any adjoining pier, wharf, dry dock terminal, building way, marine railway, or other adjoining area customarily used by an employer in building, repairing or loading a vessel. *See* 33 U.S.C. §§ 902(4), 903(a) (1976). *See also* note 44 *infra*.

[5] *See, e.g.*, Levinson v. Deupree, 345 U.S. 648, 649-51 (1953) (collision of two pleasure boats within admiralty jurisdiction); Horton v. J & J Aircraft, Inc., 257 F. Supp. 120, 121 (S.D. Fla. 1966) (injuries sustained when transoceanic flight crashed into ocean cognizable in

ecutive Jet Aviation, Inc. v. City of Cleveland[6] indicated that the proper standard for determining admiralty jurisdiction involves a twofold inquiry into the situs of the tort and the tort's relationship to a traditional maritime activity.[7] In *Holland v. Sea-Land Service, Inc.*,[8] the Fourth Circuit emphasized the situs prong of the *Executive Jet* test by denying a

admiralty); Davis v. City of Jacksonville Beach, 251 F. Supp. 327, 328 (M.D. Fla. 1965) (surfboard injury to swimmer sustained admiralty jurisdiction); King v. Testerman, 214 F. Supp. 335, 336 (E.D. Tenn. 1963) (admiralty jurisdiction proper for injured water skier).

[6] 409 U.S. 249 (1972).

[7] *Id.* at 261. *Executive Jet* involved damage to a private jet liner that ingested some seagulls while taking off on a flight from Cleveland, Ohio to Portland, Maine. *Id.* at 250. The plane crashed within a fifth of a mile of land on the navigable waters of Lake Erie. *Id.* The district court denied maritime jurisdiction on the basis that the tort did not occur on navigable waters and that no relationship existed between the wrong and maritime service on navigable waters. *Id.* at 251. The Sixth Circuit affirmed because the alleged tort occurred on land before the aircraft reached Lake Erie, and the court thus found it unnecessary to consider the question of maritime relativity or nexus. *Id.* at 252. The Supreme Court affirmed the lower court's decision, holding that land-based intracontinental flights created no admiralty jurisdiction because the aircraft was not performing a traditional maritime activity. *Id.* at 273-74.

The Court's analysis focused on the maritime nexus question. *Id.* at 268-74. Additionally, the *Executive Jet* Court criticized the locality test by documenting the irrational treatment of different plaintiffs whose maritime status was virtually identical but who received different jurisdictional treatment based on considerations of locality. *Id.* at 255-56; *see* note 38 *infra*. Certain language in the opinion, moreover, suggests that in some instances the maritime nexus test should stand in lieu of the locality test. *Id.* at 261. *Executive Jet*, however, did not obviate the locality test entirely. The *Executive Jet* Court noted frequently that the locality element remained, but with the additional requirement of a particular tort having connection with a traditional maritime activity. *Id.* at 267-68. Unfortunately, the Court's resolution of the case left the role of locality undefined, since the Court decided that in the absence of a maritime nexus in intracontinental flights it was unnecessary to decide the locality question at all. *Id.* at 266-67.

One may interpret the holding of *Executive Jet* in several ways. The predominant interpretation of *Executive Jet* requires a finding of both locality and a maritime nexus. *See, e.g.*, Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758, 759-60 (4th Cir. 1973) (per curiam) (control of water level did not bear a sufficiently significant relationship to marine activity to permit admiralty jurisdiction); Oppen v. Aetna Ins. Co., 485 F.2d 252, 260 (9th Cir. 1973) (physical damage to boat caused by contact with oil slick satisfied situs and maritime nexus test). Some courts, however, have viewed *Executive Jet* as retaining the locality test except in specialized areas such as aircraft accidents or pollution incidents. *See, e.g.*, Earles v. Union Barge Line Corp., 486 F.2d 1097, 1100-01 (3d Cir. 1973) (admiralty jurisdiction proper because inhalation of toxic fumes on vessel moored in Ohio river satisfied locality test); Maryland v. Amerada Hess Corp., 356 F. Supp. 975, 977 (D. Md. 1973) (admiralty jurisdiction proper because rupture of oil transfer line in Baltimore Harbor satisfied traditional locality test). Another line of authority indicates that maritime nexus has replaced locality as the sole jurisdictional requirement. *See, e.g.*, Powers v. Bethlehem Steel Corp., 477 F.2d 643, 648 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973) (injury sustained by employee when light bulb exploded on navigable waters did not bear significant relationship to maritime activity and maritime jurisdiction not proper); Jiles v. Federal Barge Lines, 365 F. Supp. 1225, 1228 (E.D. La. 1973) (painter who fell from dry-docked steamboat onto land did not have sufficient connection to maritime activity and admiralty jurisdiction not granted).

[8] 655 F.2d 556 (4th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3589 (1981).

longshoreman's attempt to gain admiralty jurisdiction over an action arising from injuries sustained on land while assisting in the loading of a vessel.[9]

Sea-Land arose from injuries sustained by longshoreman Juston Holland in a work-related accident that occurred on a loading dock and not aboard an actual vessel.[10] Pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA),[11] Holland received immediate compensation from his employer, Nacirema Operating Company.[12] Holland then brought suit against Sea-Land Service, Inc., alleging that Sea-Land was a third-party tortfeasor subject to maritime law.[13] The district court reasoned that Holland was a longshoreman engaged in a traditional maritime activity, and the court exercised admiralty jurisdiction over the suit.[14] Since admiralty jurisdiction applied, the district court employed the maritime principle of comparative negligence,[15] rather than the Virginia doctrine of contributory negligence.[16] The jury found that Holland had sustained injuries compensable by 700 dollars but also found Holland to be seventy-five percent negligent in partially causing the accident.[17] The district judge, therefore, reduced Holland's recovery by seventy-five percent and awarded Holland 175

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[9] *Id.* at 559.

[10] *Id.* at 557.

[11] 33 U.S.C. §§ 901-950 (1976).

[12] 655 F.2d at 557. LHWCA provides compensation to employees irrespective of fault as a cause for the injury. 33 U.S.C. § 904(b) (1976).

[13] 655 F.2d at 557. A third-party tortfeasor is a party, other than an employer, who is liable for injuries sustained by an employee during the course of employment. *See* Williams v. United States Fid. & Guar. Co., 358 F.2d 799, 801 (4th Cir. 1966). The compensation remedy afforded by LHWCA is exclusive as between employer and employee. 33 U.S.C. § 905 (1976); *see* South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 256 (1940). LHWCA, however, does not affect a longshoreman's remedies against a person other than the employer. 33 U.S.C. § 933 (1976).

[14] 655 F.2d at 557.

[15] *Id.* Comparative negligence provides for an apportionment of responsibility, or of damages, in accordance with the relative fault of the parties concerned. *See* W. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 170 (3d ed. 1975) [hereinafter cited as MARITIME INJURIES]. Comparative negligence applies in maritime personal injury cases. *Id.*; *see* Ahlgren v. Red Star Towing & Transp. Co., 214 F.2d 618, 620-21 (2d Cir. 1954).

[16] 655 F.2d at 577. Contributory negligence is conduct on the part of the plaintiff that adds to the injury from which the plaintiff seeks recovery. *See* W. PROSSER, THE LAW OF TORTS 416-17 (4th ed. 1971). A successful defense of contributory negligence is a complete bar to recovery. *Id.* at 417. Virginia law recognizes the defense of contributory negligence. *See* Richmond Greyhound Lines, Inc. v. Brown, 203 Va. 950, 953, 128 S.E.2d 267, 269 (1962). Contributory negligence, however, is not a proper defense in cases of maritime tort founded upon negligence brought in admiralty. *See* The MAX MORRIS, 137 U.S. 1, 15 (1890); GILMORE & BLACK, *supra* note 1, § 7-6 at 410 n.70; note 15 *supra*.

[17] 655 F.2d at 557. Longshoreman Holland sustained injuries when certain motorized equipment overturned. *Id.* Sea-Land contended that the incident occurred because Holland made a turn at an excessive speed. *Id.* Holland, however, maintained that the accident resulted because Sea-Land negligently failed to inspect the trailer, which Holland had attached to the motorized equipment. *Id.*

dollars.[18] Holland appealed, seeking to increase the judgment, and Sea-Land cross-appealed and claimed that the Virginia law of contributory negligence barred any recovery by Holland.[19]

The Fourth Circuit reversed the district court's determination that the district court possessed admiralty jurisdiction over Holland's cause of action.[20] The Fourth Circuit noted that *Executive Jet* had created a two-part test for admiralty jurisdiction.[21] The Fourth Circuit held that *Executive Jet* limited admiralty jurisdiction to actions arising from torts that occur on navigable waters and that have a significant connection to traditional maritime activity.[22] The alleged tort occurred on land.[23] The Fourth Circuit, therefore, found that longshoreman Holland had failed to meet the dual requirements of *Executive Jet*.[24] Consequently, the Fourth Circuit held that the maritime rule of comparative negligence was inapplicable to the case and Virginia law controlled.[25]

The Fourth Circuit has consistently followed the two-prong locality nexus test set out in *Executive Jet*.[26] The locality nexus test focuses on both the situs of the alleged tort and the relationship of the tort to a traditional maritime activity.[27] Thus, a court initially must ascertain whether the tort occurred on navigable waters in determining whether to assert admiralty jurisdiction.[28] Additionally, a court will deny admiralty

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[18] *Id.*; *see* note 15 *supra.*

[19] 655 F.2d at 557.

[20] *Id.* at 559.

[21] *Id.* at 558; *see* text accompanying note 7 *supra.*

[22] 655 F.2d at 558; *accord*, Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758, 759 (4th Cir. 1973) (per curiam); Ford Motor Co. v. Wallenius Lines, 476 F. Supp. 1362, 1365 n.1 (E.D. Va. 1979).

[23] 655 F.2d at 557; *see* note 17 *supra.*

[24] 655 F.2d at 558.

[25] *Id.* at 559.

[26] *See, e.g.*, Whittington v. Sewer Constr. Co., 541 F.2d 427, 432 (4th Cir. 1976) (injury related to shore-based crane does not satisfy situs test); Richards v. Blake Builders Supply, Inc., 528 F.2d 745, 749 (4th Cir. 1975) (injuries related to pleasure boat operation satisfy nexus and situs test); Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758, 759 (4th Cir. 1973) (per curiam) (regulation of water level fails to satisfy nexus test); Crosson v. Vance, 484 F.2d 840, 842 (4th Cir. 1973) (water skiing injury insufficiently related to traditional maritime activity).

[27] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3676 (1976); *see* note 7 *supra.*

[28] *See* Calamari, *The Wake of* Executive Jet—*A Major Wave or a Minor Ripple*, 4 MAR. LAW. 52, 62 (1979) [hereinafter cited as *The Wake of* Executive Jet]. The requirement that a tort must occur on navigable water to invoke admiralty jurisdiction originated in DeLovia v. Boit, 7 Fed. Cas. 418, 420 (C.C. Mass. 1815). At the time of *DeLovia*, the concept of navigability referred to waters within the ebb and flow of the tide. Thomas v. Dane, 23 Fed. Cas. 957, 960 (C.C. Me. 1813). A subsequent case, GENESSEE CHIEF v. Fitzhugh, 53 U.S. (12 How.) 233 (1851), eliminated the tidewater restriction. *Id.* at 238. The current notion of navigable waters includes waters that are navigable in fact and are part of a highway for interstate or foreign water commerce. *The Wake of* Executive Jet, *supra*, at 62. Navigable waters would exclude waters never used for transportation or commerce. In George v. Beavark, Inc., 402 F.2d 977 (8th Cir. 1968), the court held that certain waters were navigable

jurisdiction when the alleged tort has no connection to a traditional maritime activity.[29] Unfortunately, *Executive Jet* did not clearly define the maritime nexus prong of the jurisdictional test.[30] As a result, the Fourth Circuit has opted to determine the maritime nexus on a case-by-case basis.[31]

Application of the locality nexus test to the *Sea-Land* facts compelled the Fourth Circuit to reject jurisdiction over the alleged maritime tort.[32] Longshoreman Holland sustained injuries while working on a pier.[33] Admiralty courts traditionally have considered piers to be an extension of land.[34] Adherence to the situs prong of the *Executive Jet* test required

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only for purposes of pleasure fishing, and not, therefore navigable for the purposes of commerce. *Id.* at 981. The alleged tort, therefore, failed to satisfy the situs requirement necessary to sustain admiralty jurisdiction. *Id.*

[29] *See* Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758, 759 (4th Cir. 1973) (per curiam); Crosson v. Vance, 484 F.2d 840, 842 (4th Cir. 1973); note 26 *supra.*

[30] 409 U.S. at 256-57; *see* note 7 *supra.* The Supreme Court appears to equate traditional maritime activity with a relationship to maritime service, commerce or navigation. *See The Wake of* Executive Jet, *supra* note 28, at 52.

[31] *See, e.g.*, White v. Johns-Manville Corp., 662 F.2d 234, 239 (4th Cir. 1981) (installation of materials designed, advertised and marketed as maritime asbestos products satisfies maritime nexus test); Moore v. Hampton Roads Sanitation Comm'n, 557 F.2d 1030 (4th Cir. 1976), *rev'd in part on rehearing*, 557 F.2d 1037 (4th Cir. 1977) (en banc) (cultivation of oysters does not satisfy nexus test). Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758, 759 (4th Cir. 1973) (per curiam) (regulating water level for purposes of generating electricity does not satisfy nexus test). The Fifth Circuit is the only federal court that has devised a specific test to determine whether an activity is maritime in nature. In Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied sub nom.* Chicot Land Co. v. Kelley, 416 U.S. 969 (1974), the court enunciated a four-prong test. *Id.* at 252. The *Kelly* court indicated that the functions and roles of the parties, the type of vehicles and equipment used to consummate the tort, the causation and type of injury, and the traditional concepts of maritime law are vital considerations in establishing whether a tort bears a significant relationship to a maritime activity. *Id.* The Fifth Circuit defined the maritime nexus portion of the test in favor of admiralty jurisdiction when deer poachers, making their getaway in a motor boat, sustained gunshot wounds from a rifle fired from the land. *Id.* at 521. The *Kelly* court focused on several factors in determining that the alleged tort satisfied the maritime nexus requirement. First, the alleged tort involved a boat. *Id.* at 526. Second, the land-based rifleman injured the pilot of the boat who was in charge of navigation. *Id.* at 525-26. Rifles, additionally, are not strictly for land use. *Id.* at 526. Finally, the court noted that the firing of weapons was hazardous to waterborne transportaton. *Id.* The Fifth Circuit has applied the *Kelly* jurisdictional test to numerous fact situations. *See, e.g.*, Moser v. Texas Trailer Corp., 623 F.2d 1006, 1009 (5th Cir. 1980) (injury sustained when engineer fell from second floor walkway of housing module onto barge satisifed *Kelly* test); *In re* Motor Ship Pac. Carrier, 489 F.2d 152, 156 (5th Cir.), *cert. denied sub nom.* Union Camp Corp. v. Gypsum Carrier, Inc., 417 U.S. 931 (1974) (maritime jurisdiction proper when smoke from paper mill obstructed navigation and caused collision).

[32] 655 F.2d at 557-58.

[33] *Id.* at 557.

[34] *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212, 214-15 (1969) (statute covering injuries upon navigable waters does not cover injuries on pier because piers are extensions of land); Swanson v. Marra Bros., 328 U.S. 1, 6 (1946) (injuries suffered while on pier and engaged in loading cargo on vessel lying alongside harbor do not occur on navigable waters); Minnie v. Port Huron Term. Co., 295 U.S. 647, 648-49 (1935) (substance and consummation of tort occurring on pier not maritime in nature). The Admiralty Extension Act, passed in

the dismissal of admiralty jurisdiction over the claim.[35]

Dismissing the personal injury claim on the failure of longshoreman Holland to satisfy the situs requirement indicates the rejection of a jurisdictional standard based solely on the alleged tort's connection to traditional maritime activities.[36] The Fourth Circuit requires that the locality of the tort be an independent requirement for maritime jurisdiction.[37] The locality issue, however, frequently presents difficult issues of fact. Prior to *Executive Jet*, questions often arose whether the substance and consummation of a particular tort had taken place upon navigable waters.[38] The location of the person at the time of the impact controlled in personal injury cases.[39] Thus, a seaman who fell off a boat onto land could invoke admiralty jurisdiction.[40] In contrast, however, a seaman or longshoreman who drowned after sustaining injuries from a land-based cargo sling could not invoke admiralty jurisdiction.[41] Additionally, an injury that occurred on a gangplank was within admiralty jurisdiction based upon the theory that the gangplank was an extension of the ship.[42] The requirement that the tort occur on navigable waters,

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1948, permitted admiralty jurisdiction to attach even if the consummation of the tort was on land, provided that a vessel caused the damage. 46 U.S.C. § 740 (1976). Damages or injuries on land, however, still were not within admiralty jurisdiction if a vessel did not cause the damages. United States v. Matson Nav. Co., 201 F.2d 610, 613 (9th Cir. 1953).

[35] *See* text accompanying note 23 *supra*. *But see* Swaim, *Admiralty: The Fifth Circuit "Returned to Navigation,"* 19 LOY. L. REV. 617, 622-24 (1972) (maritime nexus test should control jurisdictional decision). Some courts have relied solely on maritime nexus to grant or deny admiralty jurisdiction. *See, e.g.*, Powers v. Bethlehem Steel Corp., 477 F.2d 643, 648 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973) (land-based pile-driver injured by light bulb hanging over pier did not satisfy maritime nexus); Jiles v. Federal Barge Lines, Inc., 365 F. Supp. 1225, 1226 (E.D. La. 1973) (painting drydocked vessel not sufficient for maritime nexus). A few courts assert that the Supreme Court has rejected the locality test in favor of the significant relationship test. *See* Teachy v. United States, 363 F. Supp. 1197, 1198 n.2 (M.D. Fla. 1973) (Supreme Court sanctioned a significant relationship test in *Executive Jet*); Sandoval v. Victory Carriers, Inc., 354 F. Supp. 996, 997 n.1 (E.D. Pa. 1973) (relationship of the wrong to traditional maritime activity test used to assert jurisdiction over longshoremen's injury); note 7 *supra*.

[36] *See* note 35 *supra*.

[37] *See* note 26 *supra*.

[38] *See* T. Smith & Sons v. Taylor, 276 U.S. 179, 181-82 (1928). In *Taylor*, a longshoreman sustained injuries when a cargo sling struck him while he was standing on a pier. *Id.* at 181. Even though the longshoreman fell into the water, the court did not assert admiralty jurisdiction. *Id.* at 182. Conversely, in Minnie v. Port Huron Term. Co., 295 U.S. 647 (1935), a longshoreman incurred injuries when a hoist struck him while he was working on the deck of a vessel. *Id.* at 647. The hoist's impact knocked the longshoreman onto an adjacent pier. *Id.* The Court extended admiralty jurisdiction because the initial impact occurred on navigable waters. *Id.* at 649.

[39] *See* The STRABO, 98 F. 998, 999-1000 (2d Cir. 1900).

[40] *See* Minnie v. Port Huron Term. Co., 295 U.S. 647 (1935); note 38 *supra*.

[41] *See* T. Smith & Sons v. Taylor, 276 U.S. 179 (1928); note 38 *supra*.

[42] *See, e.g.*, The ADMIRAL PEOPLES, 295 U.S. 649, 651-52 (1935) (admiralty jurisdiction proper when passenger injured by fall from gangplank); O'Keeffe v. Atlantic Stevedoring Co., 354 F.2d 48, 50 (5th Cir. 1965) (gangplank traditionally part of ship's equipment so that injury occurring upon gangplank permitted admiralty jurisdiction).

therefore, frequently produced anomalous results. The *Holland* decision may resurrect the anomalies and extend them into the longshoring area.

The Fourth Circuit also rejected Holland's contention that the 1972 amendments to the LHWCA[43] expanded admiralty jurisdiction to include injuries arising out of traditional maritime activities performed on land.[44] Prior to the 1972 amendments, employers were responsible not only for LHWCA payments but also were susceptible to indemnity actions initiated by vessel owners who were liable to injured longshoremen under the maritime doctrine of unseaworthiness.[45] The burden of providing a seaworthy vessel lay solely upon the vessel owner even though the unseaworthiness was the result of the stevedore's actions.[46] The Supreme Court, however, limited the impact of a seaworthiness claim against the vessel owner by allowing the owner to obtain indemnity from a negligent stevedore.[47] A longshoreman, therefore, could

[43] Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251, *amending* 33 U.S.C. §§ 901-950 (1970) (codified at 33 U.S.C. §§ 901-950 (1976)).

[44] 655 F.2d at 559. The 1972 amendments to LHWCA made two major changes in the Act's coverage. Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972) (codified at 33 U.S.C. §§ 901-950 (1976)). First, Congress amended § 903, the coverage section, by expanding the locality requirement from "navigable waters of the United States (including any dry dock)" to include "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." 33 U.S.C. §§ 902(4), 903(a) (1976); *see* Gorman, *The Longshoremen's and Harbor Worker's Compensation Act—After the 1972 Amendments*, 6 J. MAR. L. & COM. 1, 5 (1974). Second, the amendments further defined the term "employee," which previously only included seamen and workers hired by small vessels, to be any person engaged in longshoring operations and any harborworker including a ship repairman, shipbuilder, and shipbreaker. 33 U.S.C. § 902(3) (1976); *see* Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683, 691 (1973). The intended effect of the 1972 amendments was to overturn judicial decisions holding that longshoremen hurt on the pier could recover only state workmen's compensation. *See, e.g.*, Nacirema Operating Co. v. Johnson, 396 U.S. 212, 216-17 (1969) (LHWCA does not cover longshoremen injured on pier). *See, generally* Comment, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972; An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94 (1972); Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 WASH. U. L.Q. 649.

[45] *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). The maritime doctrine of unseaworthiness contemplated that a vessel was reasonably fit for her intended service. *Id.* If a defective condition of a ship proximately caused an individual's injury, the ship was unseaworthy. *See* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 223 & n.3 (1958) (ship unseaworthy because leaky portholes proximately caused seaman's injury). A breach of the warranty of seaworthiness established the right of the injured party to recover regardless of fault. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 (1946); *see generally* George, *Ship's Liability to Longshoremen Based on Unseaworthiness*—Sieraki *Through* Usner, 32 LA. L. REV. 19, 23-25 (1971) (discussion of the doctrine of unseaworthiness).

[46] *See, e.g.*, Alaska S.S. Co. v. Petterson, 347 U.S. 396, 396 (1954) (per curiam), *aff'g* 205 F.2d 478 (9th Cir. 1953) (shipowner absolutely liable for injury resulting from unseaworthy equipment brought on board by independent contractor); Martinez v. Dixie Carriers, Inc., 529 F.2d 457, 468 (5th Cir. 1976) (barge unseaworthy because employer negligent in failing to provide worker with proper equipment to ensure atmosphere free of noxious fumes).

[47] *See* Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). In *Ryan*, a stevedore stored cargo negligently, causing the cargo to break free during off-loading opera-

recover from the vessel owner under the unseaworthiness remedy and the vessel owner then could implead the stevedore for indemnification if the stevedore was negligent.[48] The result, described as circular liability, was the same as a direct suit by a longshoreman against the stevedore, which the LHWCA did not permit.[49] To eliminate this potential for double payment, Congress amended section 905(b) of the LHWCA to eradicate the unseaworthiness remedy for injured longshoremen and provided that negligence would be the longshoreman's exclusive remedy against vessel owners.[50]

The Fourth Circuit gave effect to section 905(b) of the LHWCA by not permitting a longshoreman to maintain a suit in admiralty against a land-based tortfeasor.[51] To permit a longshoreman to maintain an action against a third party would allow circumvention of the exclusive liability provisions of section 905(a).[52] The LHWCA does not prohibit the right of

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tions and injure a longshoreman. *Id.* at 126. No express indemnification agreement existed between the stevedore and the vessel owner. *Id.* at 132. The *Ryan* Court held that the stevedore had breached an implied warranty of workmanlike service and thereby had become liable to reimburse the vessel owner for any damages that the longshoreman might recover under the unseaworthiness doctrine. *Id.* at 134-35. Subsequent cases expanded the warranty of workmanlike service. *See, e.g.*, Waterman S.S. Corp. v. Dugan & McNamara, 364 U.S. 421, 424-25 (1960) (shipowner has right of indemnity against stevedore even though injured longshoreman retained by consignee); Crumady v. The JOACHIM HENDRIK FISSER, 358 U.S. 423, 429 (1959) (warranty of workmanlike service breached when stevedores rendered vessel unseaworthy); Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567-69 (1958) (warranty of workmanlike performance breached when employer failed to remedy unseaworthy condition caused solely by shipowner).

[48] *See* text accompanying note 45 *supra.*

[49] *See Hearings Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor on the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972*, 92 Cong., 2d Sess. 47-48 (1972) (statement of James D. Hodgson).

One result of the right of the vessel owner being able to seek indemnity against the employer, was that the employer often in effect made double payments, by making LHWCA payments and by indemnifying vessel owners. *See* H.R. REP. NO. 92-1441, 92d Cong., 2d Sess. 1-2, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4698-99. The LHWCA, however, did not require such a result since § 933(a) of the original Act required a longshoreman to elect between accepting compensation under the LHWCA and seeking damages in a third party suit. *See* Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33(a), 44 Stat. 1424, 1440 (1927). Congress amended § 933(a) in 1959, however, to eliminate the requirement of election. *See* 33 U.S.C. § 933(a) (1976). The 1959 amendments did not endorse double recovery and the legislative history indicated congressional desire to preclude double recovery. *See* S. REP. NO. 428, 86th Cong., 1st Sess. 1 (1959), *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2134, 2135. Nonetheless, in practice double payments did occur and Congress responded by enacting § 905(b) of the LHWCA. *See* text accompanying note 50 *infra.* The Court has also limited the potential for double payments by strictly enforcing § 933 of the LHWCA, which does not permit a longshoreman to bring a personal injury suit against a third party beyond the six-month period following acceptance of compensation from an employer. *See* Rodriguez v. Compass Shipping Co., ___ U.S. ___, 101 S. Ct. 1945, 1957 (1981).

[50] *See* note 49 *supra.*

[51] 655 F.2d at 559.

[52] *See* text accompanying note 50 *supra.*

a third party, which is not a vessel, from maintaining an action against the longshoreman's employee.[53] The potential for indemnity proceedings against the employers, therefore, would reinstate the circular liability sought to be eradicated by the 1972 amendments to the LHWCA.[54]

Additionally, in refusing to assert admiralty jurisdiction over Holland's claim, the Fourth Circuit avoided the possibility of creating conflict between state and federal law.[55] A state has a strong interest in the promulgation and enforcement of laws that affect the health of its citizens.[56] Moreover, a state has an interest in preventing litigants from avoiding state laws by seeking to resolve matters in a federal proceeding.[57] The predominant state interest in adjudicating land-based torts, therefore, should prevail unless state control interferes with a valid federal interest.[58] In admiralty matters the federal interest lies in the development and application of a uniform and specialized body of law.[59]

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[53] *See* 33 U.S.C. § 905(b) (1976). LHWCA provides that the employer shall not be liable either directly or indirectly to the vessel for any damages recovered from the vessel by an injured longshoreman. *Id.* The amended LHWCA defines vessel to include the owner and the ship's personnel. *Id.* § 902(21). Apparently, however, any party not considered a vessel under LHWCA could hold the employer liable in an indemnity proceeding. *See* text accompanying note 54 *infra*.

[54] *See* note 49 *supra*.

[55] 655 F.2d at 559.

[56] *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (recognizing propriety of local regulation in field of safety); Bibb v. Navajo Freight Lines, 359 U.S. 520, 523-34 (1959) (policing of highways province of state law); Kelly v. Washington, 302 U.S. 1, 8 (1937) (state interest in health and safety overrides federal interest in maritime commerce).

[57] *See In re* Andrews, 266 F. Supp. 162, 164-65 (M.D. Fla. 1967) (admiralty jurisdiction denied when improperly used to circumvent state statute requiring permit to salvage marine wrecks of historic or archeological value).

[58] *See* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 168 [hereinafter cited as *Federalism and the Admiralty*]. When a valid nonmaritime state interest potentially conflicts with a federal interest, the Court has employed a balancing test to determine which interest predominates. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978). In *Raymond*, the Court struck down a number of Wisconsin regulations implementing statutes that barred trucks longer than 55 feet from operating on state highways. *Id.* at 447-48. The Court weighed the asserted safety purposes of the contested statutes against the degree of interference with interstate commerce. *Id.* at 443. The *Raymond* Court resolved the balancing analysis in favor of the federal interests because the state had presented no evidence supporting the safety purposes of the statutes. *Id.* at 444. Nevertheless, the Supreme Court recognized a strong presumption in favor of highway safety, and indicated that a colorable showing that the regulations further highway safety possibly would be sufficient to uphold similar statutes. *Id.*

A similar balancing test does not control analysis of admiralty jurisdiction. In 1959, the Supreme Court indicated that in admiralty matters the federal interest always predominates over the state interest by virtue of the supremacy clause of the United States Constitution. *See* U.S. CONST. art. VI, § 2; Romero v. International Term. Co., 358 U.S. 354, 355 (1959). *But see* Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961) (Supreme Court review of state decisions adequately protects federal supremacy in maritime law).

[59] *See Federalism and the Admiralty*, *supra* note 58, at 163; Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123, 133 (1925) [hereinafter cited as *Uniformity in the Maritime Law*]. Uniformity of admiralty law promotes the free move-