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CASE COMMENTS

ADMIRALTY JURISDICTION IN TORT ACTIONS

"[F]rom the very inception of the federal judiciary to the present, federal courts have taken jurisdiction (without reference to amount in controversy, diversity of citizenship, or the presence of any other 'federal question') of all causes of action arising under maritime law."¹ Admiralty has developed its own criteria for jurisdiction: in contracts jurisdiction depends on subject matter; in tort jurisdiction depends on locality.² *The Plymouth*³ set forth the locality test in the broadest terms: "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."⁴ But the precise scope of admiralty jurisdiction is not a matter of "obvious principle or of very accurate history,"⁵ and it has frequently been questioned whether locality is the *exclusive* test of jurisdiction in tort actions or whether the tort must also be of a maritime character.⁶ The exclusiveness of the locality test has never been determined by the Supreme Court,⁷ and the test continues to be questioned and attacked.

The locality test is frequently criticized in cases in which the tort occurs upon navigable waters but does not involve a vessel and has no relation to the maritime industry.⁸ Such a situation was presented in *Thomson v. Chesapeake Yacht Club, Inc.*⁹ when libelant fell into navigable waters through a hole in respondent's pier. The court held that the locality test controlled but denied admiralty jurisdiction because the negligent act or omission became operative on libelant while

¹Slaughter, *Basic Principles of Admiralty*, 19 Ark. L. Rev. 93, 95 (1965).

²The general doctrine that in contract matters, admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 480 (1923).

³*Hough v. The Western Transp. Co. (The Plymouth)*, 70 U.S. (3 Wall.) 20 (1865).

⁴*Id.* at 36.

⁵*The Blackheath*, 195 U.S. 361, 365 (1904).

⁶*E.g.*, *Atlantic Transp. Co. v. Imbrovek*, 234 U.S. 52 (1914).

⁷"No definitive judicial determination was ever made as to whether locality was the sole and exclusive test, or whether the maritime character of the particular tortious act was likewise a relevant jurisdictional consideration." Note, 60 Mich. L. Rev. 208, 209 (1961).

⁸*E.g.*, *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).

⁹Admiralty No. 4820, D. Md., Oct. 26, 1965. It should be noted that under the saving to suitors clause, § 9 of the Judiciary Act of 1789, 1 Stat. 76, 79 (1789), as codified in 28 U.S.C. § 1333 (1948), libelant could have proceeded as an ordinary tort plaintiff in the Maryland court system.

he was still on land even though libelant suffered no injury until he struck the navigable waters. The court stated that the tort was complete before libelant touched the water and the subsequent injury related only to the extent of damages and was not significant in determining whether this action was of a maritime nature.¹⁰ If locality is the exclusive test of admiralty jurisdiction in tort actions, *Thomson* was within the admiralty jurisdiction.

The fact that the tort in *Thomson* did not involve a vessel has no bearing on the locality test.¹¹ Admiralty jurisdiction has been upheld in cases involving water skiers,¹² bathers,¹³ and aircraft passengers¹⁴ despite the fact that no vessel was involved.¹⁵

The crucial requirement of the locality test is that "the wrong and injury . . . or at least, the substance and consummation of the same must have taken place wholly upon . . . [navigable] waters."¹⁶ Admiralty has long held that when the necessary elements of the tort¹⁷ occur partly on land and partly on navigable waters, the place of the injury constitutes the "substance and consummation" of the tort.¹⁸

In *McDonald v. Cape Cod Trawling Corp.*¹⁹ a lamppost fell from the wharf and struck a seaman aboard a vessel. The court upheld admiralty jurisdiction stating that "this is a commonplace illustration of the familiar general conflict of laws rule that the place of wrong is the place where the last event necessary to make an actor liable for

¹⁰*Thomson* was quoting directly from *Wiper v. Great Lakes Eng'r Works*, 340 F.2d 727, 730 (6th Cir. 1965).

¹¹"The jurisdiction of admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel . . ." *Supra* note 3, at 35.

¹²*King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963).

¹³*Reinhardt v. Newport Flying Serv. Corp.*, 232 N.Y. 115, 133 N.E. 371 (1921). It should be noted that in *Reinhardt* the court was primarily concerned with whether a seaplane was a vessel and did not question the status of the bather. But cf. *McGuire v. City of New York*, *supra* note 8.

¹⁴*Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1959).

¹⁵Admiralty jurisdiction has also been upheld in cases which involve "things" not technically considered "vessels," e.g., drydocks, *United States v. Bruce Dry Dock Co.*, 65 F.2d 938 (5th Cir. 1933); and incomplete vessels, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922); Note, 4 *Texas L. Rev.* 306, 310 (1926).

¹⁶*Supra* note 3, at 35.

¹⁷The necessary elements of the tort of negligence are: (1) duty violation; (2) causal connection between duty-violating conduct and the resulting injury; (3) actual loss or damage. Proof of damages is thus an essential part of plaintiff's case. *Prosser, Torts* § 30 (3d ed. 1964).

¹⁸*Rundall v. La Campagne Generale Transatlantique*, 100 Fed. 655, 657 (7th Cir. 1900).

¹⁹71 F. Supp. 888 (D. Mass. 1947).

an alleged tort occurs.”²⁰ Without injury there is no tort of negligence but only “damnum absque injuria,”²¹ and it is “clear that the locality of the thing to be considered is that of the thing injured, and not of the agent causing the injury”²²

In *The City of Lincoln*²³ and in *Fireman's Fund Ins. Co. v. City of Monterey*²⁴ respondents' wharves collapsed and libelants' goods were thrown into navigable waters. The courts held, directly contrary to *Thomson*, that “the injury to libelant's steel-booms was effected wholly in the water, into which they were thrown through the breaking down of the wharf. The whole ‘substance and consummation of the injury’ were . . . in the water. It was the water that did the damage. That was the *place* of the damage and consequently the place of the tort, for the purpose of jurisdiction.”²⁵ Admiralty jurisdiction has also been upheld when faulty repairs or maintenance on land caused an aircraft to crash at sea. If there is no impact upon the person or property before striking the water “it is recognized that the tort occurs upon the water within the admiralty jurisdiction.”²⁶

The language of *The Plymouth* in establishing the locality test was certainly broad, yet it provided a single and precise criterion for determining admiralty jurisdiction in tort actions.²⁷ The majority of courts have maintained that locality is still the exclusive test for determining admiralty jurisdiction in tort actions²⁸ and that jurisdiction is not affected by the character or extent of the tort, or by the relations of the persons injured.²⁹ Thus *Thomson* should be within admiralty jurisdiction because it meets the *sole* requirement of the locality test that the tort be consummated on navigable waters.

But there has always been some doubt whether locality was merely

²⁰*Id.* at 890.

²¹*Hermann v. Port Blakely Mill Co.*, 69 Fed. 646, 651 (N.D. Cal. 1895).

²²*Smith v. Lampe*, 64 F.2d 201, 202 (6th Cir. 1933); *Dorrington v. City of Detroit*, 223 Fed. 232, 242 (6th Cir. 1915). “It has long been established law that, if a person on the high seas is killed by a shot fired by a person on shore, the offense is committed on the high seas.” *Fireman's Fund Ins. Co. v. City of Monterey*, 6 F.2d 893, 894-95 (N.D. Cal. 1925).

²³25 Fed. 835 (S.D.N.Y. 1885).

²⁴6 F.2d 893 (N.D. Cal. 1925).

²⁵*Supra* note 23, at 837 (Emphasis added.)

²⁶*Wilson v. Transocean Airlines*, *supra* note 14, at 92.

²⁷When the locality test “was announced, it was believed both by the courts and by the profession that a single test for tort jurisdiction had been established.” Note, 75 U. Pa. L. Rev. 655 (1927).

²⁸ “[T]he weight of authority is clearly to the effect that locality alone determines whether or not a tort claim is within admiralty jurisdiction.” *Weinstein v. Eastern Airlines, Inc.*, *supra* note 14, at 763.

²⁹*The Highland Light*, 12 Fed. Cas. 138 (No. 6477) (C.C.D. Md. 1867).

one of the tests for determining admiralty jurisdiction or the *sole* test. The most famous of these is "Mr. Benedict's celebrated doubt" which questions whether admiralty jurisdiction would extend to an assault between two bathers, which obviously does not involve a vessel and has no relation to the maritime industry.³⁰

The doubts about the locality test were created, not by any ambiguity in *The Plymouth*, but by the terminology and holdings of subsequent cases. The first cases to cast doubt on the locality test involved ship-to-shore injuries, termed "amphibious torts."³¹ For 40 years after *The Plymouth* "admiralty denied jurisdiction where damage was done by a ship to any object fixed to land."³² Then *The Blackbeath*³³ extended admiralty jurisdiction to cover a collision between a vessel and a beacon surrounded by navigable waters but attached to land.³⁴ *The Blackbeath* held that although the beacon was attached to land its *purpose* was to serve as an "aid to navigation"; therefore it was within admiralty jurisdiction. Justice Brown, concurring, stated that this extension of admiralty jurisdiction to cover structures affixed to land overruled *The Plymouth* and the locality test and that "to attempt to draw the line of jurisdiction between different kinds of fixed structures, as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."³⁵ In subsequent cases *The Blackbeath* was held not to overrule the locality test but to create a minor exception to it. Locality was still the test for admiralty jurisdiction in tort actions with the exception that if the structure was an "aid to navigation" admiralty had jurisdiction regardless of the fact that the structure was attached to land.³⁶ However, Justice Brown's prediction of confusion and unnecessary litigation was borne out,³⁷ and the courts became involved in a long line of cases which

³⁰Benedict, Admiralty 351 (6th ed. 1940).

³¹Jurisdiction over ship-to-shore injuries was regulated by the Extension of Admiralty Act, which extended admiralty jurisdiction to all torts "caused by a vessel on navigable waters." 62 Stat. 496, 46 U.S.C. § 740 (1948). However, since the Act was concerned only with vessel-caused injury, it did not affect the situation in *Thomson*, which involved a shore-to-water injury in no way related to any vessel.

³²*Supra* note 27.

³³*Supra* note 5.

³⁴The beacon "was built on piles driven firmly into the bottom. There is no question that it was . . . part of [the realty] . . ." *Supra* note 5, at 364. But see *Doullut & Williams, Inc. v. United States*, 268 U.S. 33, 34 (1925).

³⁵*Supra* note 5, at 369.

³⁶*Gilmore & Black, Admiralty* 432 (1957); 1 Benedict § 129 (6th ed. 1940); Note, 60 Mich. L. Rev. 208 (1962). See *The Barbara Cates*, 8 F. Supp. 470 (E.D. Pa. 1934); *The Senator*, 54 F.2d 420 (D. Del. 1931).

³⁷There has been much confusion and litigation over the difficulty of differ-

attempted to distinguish a land structure from an "aid to navigation." The questionableness of some of these distinctions is exemplified by the cable cases in which submarine cables used for communication were deemed "aids to navigation" and held to be within admiralty jurisdiction³⁸ while cables used solely to carry electric current were deemed land structures and not within admiralty jurisdiction.³⁹

In all of the cases involving an "aid to navigation" attached to land, the court looked beyond the locality of the structure and sought to ascertain the *purpose* of the structure. Such consideration of *purpose*, aside from locality, led to direct attacks on the exclusiveness of the locality test. *Atlantic Transp. Co. v. Imbrovek*⁴⁰ questioned whether locality was the *sole* test of admiralty jurisdiction in tort actions or whether the basis for "all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event . . ." ⁴¹ The petitioner contended that the locality test is not exclusive and "that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occurrence, has been of a maritime character." ⁴² *Imbrovek* gave no decision on the locality test because "in the present case the wrong which was the subject of the suit was, we think, of a maritime nature, and hence the District Court, from any point of view, had jurisdiction." ⁴³

Imbrovek furnished impetus to those attacking the locality test as arbitrary, wholly irrational, bearing no relation to the purpose of admiralty jurisdiction, and a blind following of history.⁴⁴ The "reasoning" behind the locality test is said to be exemplified by the quaint statement of the respondent in *The Plymouth* that once "we broke the Constitution by discarding the limit of tidewater and the sovereign arbitrament of the moon" we must now hold to the his-

entiating between objects or structures which take their character from the land to which they are in some way connected and those which are deemed so related to navigation as to become subjects of maritime jurisdiction. Farnum, Admiralty Jurisdiction and Amphibious Torts, 43 Yale L.J. 34, 39 (1934).

³⁸Postal Tel. Cable Co. v. P. Sanford Ross, Inc., 221 Fed. 105 (E.D.N.Y. 1915).

³⁹Nippon Yusen Kabushiki Kaisha v. Great W. Power Co., 17 F.2d 239 (9th Cir. 1927).

⁴⁰*Supra* note 6.

⁴¹*Id.* at 61.

⁴²*Id.* at 60.

⁴³*Id.* at 61.

⁴⁴Black, Admiralty Jurisdiction: Critique And Suggestions, 50 Colum. L. Rev. 259, 264 (1950); Ryan, The Amphibious Tort Problems, 13 Brooklyn L. Rev. 129 (1947); Bruncken, Tradition And Commonsense In Admiralty, 14 Marq. L. Rev. 16, 17 (1929).

torically established locality test.⁴⁵ Those objecting to the locality test offer as additional or alternative tests (1) that a vessel be involved or (2) that the incident be of a *maritime nature*.

Vessels are felt to be necessary because "admiralty was the result of commerce on the high seas, the commerce made possible by sailing vessels. Just as vessels were the source of admiralty, they remain the focal point of admiralty jurisdiction."⁴⁶ This view contends that the locality test does not mean that "a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in . . . [navigable waters] is for that reason within the jurisdiction of the admiralty."⁴⁷ "Merely because events occur upon navigable waters does not put them within the admiralty and maritime jurisdiction. Transactions are 'maritime' only when in some way connected with a 'vessel'."⁴⁸

Nevertheless it has frequently been contended that pleasure boating, which involves vessels, should not be within the admiralty jurisdiction.⁴⁹ The word "vessel" is highly ambiguous and might include a raft⁵⁰ but not an ocean liner afloat but unfinished.⁵¹ There is nothing magic about the word "vessel" which assures that it is a proper subject of maritime concern. There seems little reason why a collision between two rafts should be in admiralty (under the maritime nature test) any more than a collision between two bathers (under the locality test), or why admiralty should concern itself with nonmaritime events which take place on vessels, for example, dog bites⁵² and thefts.⁵³

A broader alternative to the locality test than vessel-involvement is that of the maritime nature of the incident. "The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist" ⁵⁴ Thus viewed, admiralty would extend to all torts arising out of maritime matters, whether

⁴⁵Bruncken, *supra* note 44, at 17.

⁴⁶McGuire v. City of New York, *supra* note 8, at 871.

⁴⁷Campbell v. H. Hackfeld & Co., 125 Fed. 696, 700 (9th Cir. 1903).

⁴⁸Robinson, Admiralty § 8 at 42 (1939).

⁴⁹Comment, 23 Wash. & Lee L. Rev. 169 (1966).

⁵⁰"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." Pleason v. Gulfport Shipbldg. Corp., 221 F.2d 621, 623 (5th Cir. 1955).

⁵¹Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); The Francis McDonald, 254 U.S. 242 (1920).

⁵²The Lord Derby, 17 Fed. 265 (E.D. La. 1883).

⁵³The Minnetonka, 146 Fed. 509 (2d Cir. 1906).

⁵⁴Campbell v. H. Hackfeld & Co., *supra* note 47, at 697.

occurring on sea or land.⁵⁵ England and France apply the maritime nature test to determine admiralty jurisdiction and it has been contended that this is the most realistic test.⁵⁶

The maritime nature test, however, creates the difficulty of a case-by-case determination of what is of a "maritime nature."⁵⁷ The difficulty of applying this test is well known in contract cases⁵⁸ and is evidenced by the long established arbitrary principle that construction of a vessel is not maritime in nature while repairing a vessel is maritime.⁵⁹ "[M]aritime transactions are inseparably connected with and shade into the non-maritime"⁶⁰ and no satisfactory basis for distinguishing the 2 has been developed. If tort locality is no longer to be considered, it is questionable how far inland the maritime nature test should extend.⁶¹ Thus while the locality test has been criticized, there are also grounds for criticizing the suggested alternative tests.

Proper evaluation of these proposed tests or any test for admiralty jurisdiction necessitates making a choice as to the purpose of an admiralty jurisdiction. The logical validity of any test for admiralty jurisdiction depends largely upon one's view of the purpose of admiralty. Even the supposedly irrational locality test can be justified under at least 1 view of admiralty's purpose. Such a view contends that admiralty developed to handle the peculiar needs of the maritime industry,⁶² and, taking a purely analytical approach, an obvious peculiarity of the maritime industry is that it is the only 1 involving transportation on water.⁶³ "There can be nothing more maritime than the sea"⁶⁴ and "the guide to admiralty jurisdiction must be the needs of the sea or the needs of seagoing commerce."⁶⁵ Thus if admiralty is based on the peculiar needs and hazards of the sea, admiralty jurisdiction should extend to all actions arising from occurrences on the sea, and locality seems a logical test. Under the local-

⁵⁵"[A] tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land." *Strika v. Netherlands Ministry Of Traffic*, 185 F.2d 555, 558 (2d Cir. 1950).

⁵⁶*McGuire v. City of New York*, *supra* note 8, at 867. See 25 Harv. L. Rev. 381 (1912).

⁵⁷Note, 16 Harv. L. Rev. 210, 211 (1903).

⁵⁸*Ibid.*; 25 Harv. L. Rev. 381, 382-83 (1912).

⁵⁹The Francis McDonald, *supra* note 51.

⁶⁰Gilmore & Black, *supra* note 36, at 27.

⁶¹Note, 75 U. Pa. L. Rev. 655, 658-59 (1927).

⁶²Gilmore & Black, *supra* note 36, at 11.

⁶³Another obvious peculiarity of the maritime industry before the 19th century was that it was the only major means of bulk transportation.

⁶⁴*Weinstein v. Eastern Airlines, Inc.*, *supra* note 14, at 763.

⁶⁵*McGuire v. City of New York*, *supra* note 8, at 871.

ity test an action arising from an aircraft crash in the sea, though not involving a vessel or the maritime industry, would be within admiralty jurisdiction because "when an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels."⁶⁶

Thus the locality test is logically sound under the view that admiralty's purpose is to deal with actions involving the peculiar needs and hazards of the sea. The locality test is also simple and easy to apply,⁶⁷ and "the fact that in a few unusual instances the results reached may be . . . [seemingly technical] is counterbalanced by the fact that strict application of the test makes it possible to predict with accuracy the results to be reached in a given case."⁶⁸ The only difficult aspect of the locality test is determining where the tort was consummated, and a careful analysis of the facts will eliminate that difficulty.⁶⁹ Careful analysis of the facts in *Thomson* reveals that the injury, therefore the consummation of the tort, occurred on navigable waters. Thus under a pure locality test *Thomson* was within admiralty jurisdiction.

Though the locality test is not so irrational as some critics have contended, its logical validity does hinge upon acceptance of the view that the purpose of admiralty is to handle actions involving the peculiar needs and hazards of navigable waters. However, such a purpose for admiralty seems too narrow in view of the present highly developed and complex maritime industry. A preferable purpose for admiralty is to provide "orderly and uniform judicial governance of the concerns of the maritime industry."⁷⁰ Such judicial governance should be furnished by a separate system of admiralty courts⁷¹ with

⁶⁶Weinstein v. Eastern Airlines, Inc., *supra* note 14, at 763.

⁶⁷Note, 4 Texas L. Rev. 306, 315 (1926); Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L. Rev. 529, 533 (1924); Note, 54 Nw. U.L. Rev. 508, 510 (1959).

⁶⁸Note, 4 Texas L. Rev. 306, 315 (1926). "If the Court . . . [had] left the locality test intact and without qualifications there would be little doubt as to when maritime law should be applied . . ." Note, 54 Nw. U.L. Rev. 508, 510 (1959).

⁶⁹Note, 4 Texas L. Rev. 306, 315 (1926).

⁷⁰Black, *supra* note 44, at 262.

⁷¹Since the adoption of the Constitution, instance (non-prize) admiralty actions in the United States have not been heard by a special court. Admiralty actions are placed on a separate admiralty docket in 31 federal judicial districts; the other 57 maintain no separate admiralty docket. Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 7 (1959). However, it frequently develops that almost all admiralty actions are heard by one judge within the district and considerable expertise may already exist under the