New Guidelines for Admiralty Tort Jurisdiction

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NOTES

NEW GUIDELINES FOR ADMIRALTY TORT JURISDICTION

Federal judicial power over maritime torts was created by article III, § 2, of the United States Constitution, and effectuated by the Judiciary Act of 1789. Since that time, many attempts have been made to formulate practical tests which would enable the federal courts to determine which tort actions properly fall within admiralty jurisdiction.

Such tests should be based upon those attributes of the maritime industry and admiralty law which motivated the Constitution's framers to expressly create federal maritime jurisdiction. However, previous tests have failed to properly draw jurisdictional lines, largely because they have bypassed this examination. In Peytavin v. Gov't Employee's Ins. Co., the court appears to have finally set out a test which enables accurate jurisdictional classification. To properly judge the merits of the Peytavin test, consideration must first be given to the traditional justifications for maritime jurisdiction.

JUSTIFICATIONS FOR MARITIME JURISDICTION

One traditional rationale for maintaining a separate admiralty jurisdiction is the federal interest in the uniform application of maritime law. At the time of the Constitutional Convention, the idea of a separate United States admiralty court was barely emerging. Yet, concern for the uniform administration of the general maritime law made it clear that international and interstate transactions on navigable waters would raise questions requiring resort to the law of nations and maritime commerce. Uniformity in this area was essential for the smooth flow of commerce among nations and states. A young nation could ill-afford being out of step with the international trading market. It was also recognized that this uniformity could not be attained by the conflicting and changing rules developed in state courts under the Articles of Confederation. Thus, the submission of

3. 453 F.2d 1121 (5th Cir. 1972).
maritime cases to a federal judiciary was deemed essential, as evidenced by the fact that admiralty is specifically included in the jurisdictional section of the Constitution.

Although the desire for uniformity explains why maritime cases should be handled by the federal judiciary, it does not completely explain the necessity of a separate body of law. The answer lies in the special complexity of maritime business relations which require a tribunal enjoying a particular expertise and applying separate legal doctrines. Since the Middle Ages the law applicable to maritime affairs has been regarded as logically and practically separate from ordinary municipal law, and has retained an international flavor. Despite advances in navigation, the maritime industry is still plagued by hazards and problems similar to those which dictated the need for a separate maritime law in the Middle Ages. Thus, retention of separate jurisdiction is justified by practical realities and the overriding goal of perpetuating the vitally important maritime industry. The maritime industry is still to a large extent, transient, far-flung and fraught with perils. Those dealing with that industry are, consequently, entitled to remedies and defenses peculiarly fitted to such ventures and should not be subjected to the idiosyncracies of each ports' local law.

5. Id.
7. Id. at 280. The suggestion that the expertise of admiralty judges is increased by virtue of separate admiralty jurisdiction is open to criticism. Whether the jurisdiction is separate or not, the same judges decide the case. However, it would appear that the separation of admiralty increases expertise somewhat by forcing the courts to take particular cognizance of the maritime nature of the case. Furthermore, any advantage to be gained by having admiralty cases heard by a single maritime court or agency is outweighed by the disadvantages: a centralized agency or court would be inconvenient for litigants; the traveling costs involved might be prohibitive; and the delays would hinder business. In any event there is nothing to suggest that any change in the present system is soon forthcoming. Id. at 280.
10. Pelaez, Admiralty Tort Jurisdiction—The Last Barrier, 7 DUQUESNE L. REV. 1, 42-43 (1968) (emphasis added) [hereinafter cited as Pelaez]. In passing, it should be noted that admiralty jurisdiction offers many distinct advantages. It enables the libellant to gain access to the federal courts without proof of diversity or amount in controversy. See The Robert W. Parsons, 191 U.S. 17, 33 (1903); Peytavin v. Government Employees Ins. Corp., 453 F.2d 1121, 1122 (5th Cir. 1972).
THE HISTORICAL TEST FOR ADMIRALTY JURISDICTION: STRICT LOCALITY

Any test which purports to establish the boundaries of admiralty tort jurisdiction must insure that the cases it selects involve those torts, . . . [which] . . . in the whole range from the most literally physical to the purely commercial, are so related to the conduct of the maritime industry that the federal interest in that industry may best be implemented by drawing them into the admiralty jurisdiction. 11

The Court of Admiralty in England during the Middle Ages

The libellant may commence his suit in any district where he can obtain service upon the respondent or attach a lien upon the ship. Pelaez, supra at 1. Since admiralty substantive law is applied in all maritime cases, a suitor can avoid all choice of law problems. These special rules were developed to allow for the redress of wrongs done by ships which, under the civil law, would be impossible to obtain because of the ambulatory nature of a ship. Id. at 1-2.

Another important advantage found in admiralty is the use of the doctrine of comparative negligence. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); The Max Morris, 137 U.S. 1 (1890); Byrd v. Napoleon Ave. Ferry Co., 125 F. Supp. 573 (E.D. La. 1954), cert. denied, 351 U.S. 925 (1956). Moreover, by bringing suit in admiralty, one can use maritime liens, which were first introduced to secure loans to shipowners:

Ships require a vast and bewildering various amount of supply and repair. An outgoing ship will normally have taken on some stores and fuel for her voyage at the port of lading. She will have run up a wharfage bill, and incurred various port fees. She will have been loaded by stevedores. She will probably be taken out by a pilot, and assisted at the start of her voyage by tugs. From time to time she will have to be repainted and repaired. A host of special callings and industries has arisen to furnish these and a hundred other supplies and services, and maritime liens are granted to secure payment. Gilmore, supra note 2, at 16.

The maritime lien thus insures that the party aggrieved has a speedy, certain and efficacious remedy in his lien upon the offending thing, and his right to arrest it and subject it to the payment of his claim. The vessel may be a foreign one, departing perhaps never to return, or the owner may be unknown or reside abroad. But so long as she remains in port, libellant's remedy is unimpaired.

Brown, Jurisdiction of the Admiralty in Cases of Tort, 9 COLUM. L. REV. 1, 11 (1909) [hereinafter cited as Brown].

Finally, jury trial is not required and statutes of limitations are not applicable (although the doctrine of laches may apply). Parties may desire to use these features for tactical reasons.


In other words, there is more than a fortuitous relationship between commerce and admiralty; if there is no commercial element involved—if the people who make their living by transporting cargo or passengers could not care less—there is no reason to apply admiralty law.

Id. at 665.
handled practically all mercantile and shipping cases. Its powers extended to torts committed on the sea, on the public rivers, and to all cases of collision. Legal concepts applied by this court were derived from the civil law admiralty classics, thereby injecting civil law maritime principles into English law, a feature which still remains. However, in the 16th century the English admiralty court began a decline which continued for two centuries. Led by Lord Coke, the common law courts limited admiralty's jurisdiction, thus eradicating many of the civil law features. By strictly construing "done on the sea" in the existing statutes, Coke restricted admiralty jurisdiction over contracts so that even those covering a maritime subject matter, if made on the land, were placed within common law jurisdiction.

When the Constitution was drafted, admiralty jurisdiction in England was still in its period of eclipse, and the maritime law in this country was administered by the states. The state-operated system was so unsatisfactory that it led to a demand for federal jurisdiction over cases in admiralty: the Constitution granted power to the federal judiciary over "all cases of admiralty and maritime jurisdiction."

DeLovio v. Boilt was the first case determining the scope of this language. In this case the circuit court was faced with the problem of determining whether English maritime law was to be followed when

12. Holdsworth, supra note 8, at 552. In fact, the admiralty court was recognized as one of the tribunals of the law merchant. Id.
13. Holdsworth, supra note 8, at 552.
17. Holdsworth, supra note 8, at 553-55. The attack of the common law courts was prompted by a number of factors. Since the admiralty courts were encumbered with fewer procedural restraints than the common law courts, the admiralty courts attracted many litigants. Chamlee, An Introduction to Admiralty, 22 Mercer L. Rev. 523 (1971) [hereinafter cited as Chamlee]. The resulting loss of fees by the common law courts certainly helped to stimulate their attack. Id.; Holdsworth, supra note 8, at 553-555; Robertson, supra note 8, at 33; Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214, 1216 n.17 (1954). However, it appears that the foremost reason for the attack was based in the fact that admiralty courts did not afford litigants the right to jury trial. Common law courts believed that the right to jury trial was an essential safeguard against the power of the monarchy. Therefore, they sought to bring as many litigants as possible within their jurisdiction. Robertson, supra note 8, at 104.
18. Gilmore, supra note 2, at 9; Holdsworth, supra note 8, at 553-54.
20. Robertson, supra note 8, at 100-01.
21. 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Story, Circuit Justice).
construing the constitutional provision. By placing all land-made contracts outside of admiralty law, the English approach greatly restricted admiralty jurisdiction. Justice Story decided that this severe restriction did not apply in the United States. He held that in contract cases, locality was not the test and, henceforth, jurisdiction over contracts would be determined by reference to "the maritime relation of its subject matter." Story interpreted the word "maritime," when added to "cases of admiralty," to expand admiralty contract jurisdiction to the full extent exercised on the Continent.

However, Story did not limit his discussion to contract jurisdiction. He also briefly dealt with maritime tort jurisdiction and, in dicta, abandoned the civil law approach. Story stated that tort cases were "necessarily bounded by locality," although he did not attempt to explain why the subject matter test must be used to determine contract, but not tort, jurisdiction.

The conclusion that tort jurisdiction is dependent upon locality was not inevitable. English admiralty had developed from Continental law, and Story recognized that the Constitution did not prohibit resort to European precedent. In France, for example, the test of jurisdiction for tort, as well as for contract, depended upon the maritime nature of the dispute.

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22. Holsworthy, supra note 8, at 553-55.
23. 7 F. Cas. at 444. See Deutsch, Development of the Theory of Admiralty Jurisdiction in the United States, 35 Tul. L. Rev. 117, 118 (1960).
24. 7 F. Cas. at 442, 444.
25. 7 F. Cas. at 441, 443. See also Benedict, supra note 4, § 5, at 6-7.
26. 7 F. Cas. at 444. It appears that the "uncompromising spirit of the old common-law judges in the tradition of Coke and Holt was still exercising at least a remote measure of influence" on Justice Story when he adopted the territorial limitation in tort cases. Farnum, Admiralty Jurisdiction and Amphibious Torts, 43 Yale L.J. 34, 37 (1933).
27. See generally Swain, Yes, Virginia, There Is An Admiralty: The Rodrique Case, 16 Loyola L. Rev. 43, 60-61 (1970) [hereinafter cited as Swain]. A possible explanation for this result is that Story felt politically constrained to limit admiralty tort jurisdiction. At the time expansion of federal power through judicial pronounce-
28. See Black, supra note 6, at 264; Pelaez, supra note 10, at 3-5; Swain, supra note 27, at 61.
29. 7 F. Cas. at 441, 443.
their origins to civil law sources, Story could have adopted a test of jurisdiction based on the maritime nature of the tort. Instead, without mentioning the alternative, Story fell prey to the simplistic approach developed in the English common law. He treated the locality of the tort as determinative, even though territorial jurisdiction was unknown in Continental law, and only arose as part of the historical development of the common law.

Since the uniform and consistent administration of maritime law, and the peculiar complexity of the subject matter are the justifications for having a separate admiralty jurisdiction, the locality test can be defended only if it leads to results which are consistent with these purposes. The locality test has failed in this respect. Despite its alleged ease of application,

[t]he strict locality theory of admiralty tort jurisdiction has never proved wholly satisfactory. Because it is in no way geared to the problems of the maritime industry itself, it often causes bizarre [sic] results contrary to the very purposes of the admiralty.

Under the locality test, a court must decide whether the tort occurred on navigable waters or on land. This decision involves a factual determination dependent upon the court's choice of locality as the place (1) where the negligent act was committed, (2) where the damage occurred, or (3) where the impact of the negligent act first came to rest. Courts did not reach consistent locality determinations, thus subverting an important goal of a separate admiralty jurisdiction.

The inconsistency between the underlying purposes of maritime law and the locality test's result can be traced to The Plymouth, which was the first case to clearly adopt the locality test. The court held that a suit in admiralty did not lie where damage occurs on land, even if the damage was caused by the negligent operation of a vessel.

31. Id. See Gilmore, supra note 2, at 1-11.
32. Harvard Note, supra note 15, at 381.
33. See notes 4-10 supra & text accompanying.
35. Pelaez, supra note 10, at 36.
36. See Handbook, supra note 14, at 77; Swain, supra note 27, at 61.
37. 70 U.S. (3 Wall.) 20 (1866).
38. Id. at 36.
Similarly, in *Johnson v. Chicago and Pacific Elevator Company*,\(^9\) the court held that the tort occurred on land where the jib boom of a schooner struck and damaged a warehouse, causing a quantity of corn to be lost in the river.\(^{40}\) Despite the fact that both the negligence and the loss occurred on navigable waters, the fact that it resulted in damage to the warehouse on land intervened to preclude jurisdiction. Thus, the tort was localized

at the point where the defendant's force came into contact with the thing injured, notwithstanding that even the principal damage occurred by the resulting precipitation of something into the water.\(^{41}\)

*Johnson* is in direct conflict with the result in *The City of Lincoln*.\(^{42}\) In that case overloading resulted in the collapse of a wharf, causing libellant's property to be dumped into the water. The court held that admiralty had jurisdiction because the tort was consummated on the water.\(^{43}\) Certainly, a test which yields such strangely contradictory results is not adequately promoting the purposes underlying admiralty jurisdiction.

The same problems have arisen in cases of personal injuries. In *T. Smith and Son, Inc. v. Taylor*,\(^{44}\) a longshoreman, on a projection of a wharf, was struck by a cargo sling mounted on the vessel, knocked into the water and killed. The court denied maritime jurisdiction, reasoning that the event giving rise to the action occurred on the wharf, an extension of the land.\(^{45}\) Although the negligent act (1) originated on a vessel resting on water, (2) occurred in the course of maritime work, (3) arose under a maritime contract, and (4) caused death to occur in navigable waters, the case was held outside maritime jurisdiction merely because the blow occurred while the deceased was on land. Yet, what could be more a part of maritime commerce than a longshoreman unloading a ship?\(^{46}\)

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40. Id. at 397.
42. 25 F. 835 (C.C.S.D. N.Y. 1885).
43. Id. at 837. *Cf.* *The Haxby*, 95 F. 170, 171 (C.C.E.D. Pa. 1899). In *Haxby* property was thrown into the water when a steamer struck a pier. Compare *Haxby* with *The Strabo*, 98 F. 998 (2d Cir. 1900), where it was reasoned that whether the injury occurred on the wharf or in the water was irrelevant because the injury was inevitable once the chain of events had been set in motion.
44. 276 U.S. 179 (1928).
45. Id.
46. The court in *T. Smith* "explained" its result by pointing out that it insured that the decedent's widow could recover under the Louisiana compensation law.
The so-called "ladder cases" also demonstrate the inconsistent results obtained when applying the locality test. In *The Strabo*, the libellant sustained injuries when he fell off a ladder extending from the ship to the dock. Although the circuit court purported to follow *The Plymouth*, recovery was allowed in admiralty. The court actually restructured the locality test, holding that the tort need not be consummated on navigable waters as long as the wrongful act was put in motion and took effect totally on board ship. A contrary decision was reached in *H.S. Pickands*. In this case the libellant was hurt when he fell to the pier from a ladder extending from the vessel to the wharf; the accident occurring when the ship's master shifted the ladder. Since the slippage of the ladder occurred on land, the court held that insufficient grounds existed for maritime jurisdiction: the tort was not consummated and the damage was not suffered on navigable water.

The numerous court-made and congressional exceptions to the

U.S. at 181-182. However, an opposite result was reached in another compensation case, *Interlake Steamship Co. v. Nielsen*, 338 F.2d 879 (6th Cir. 1964), *cert. denied*, 381 U.S. 934, *rehearing denied*, 382 U.S. 873 (1965), where decedent was killed when he drove his automobile onto the frozen water of Lake Erie. Libellant was allowed to recover under the Longshoremen's and Harbor Worker's Act, 33 U.S.C. § 901 et seq. (1970). The fact that the impetus of the harm originated on land was held to be irrelevant because the harm occurred on navigable water. A result inconsistent with the result in *T. Smith* was also reached in *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935). In *Minnie*, a longshoreman was injured when he was struck by a hoist and thrown from the ship to the land. The court found admiralty jurisdiction.

The propensity of the locality test to produce anomalous results is also illustrated by several decisions involving claims of unseaworthiness against ships. In *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, *rehearing denied*, 374 U.S. 858 (1963), a longshoreman was injured on the dock by his employer's equipment while he was unloading the ship. A suit in admiralty was allowed. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, *rehearing denied*, 328 U.S. 878 (1946), an unseaworthiness claim in admiralty was allowed where a longshoreman was injured on a ship in the course of the unloading process. But in *Victory Carriers Inc. v. Law*, 404 U.S. 202, *rehearing denied*, 404 U.S. 1064 (1971), recovery in admiralty was denied to a longshoreman injured as a result of a defect in his employer's forklift. The injury occurred on a pier while the longshoreman was moving cargo to be loaded on the ship later by the ship's equipment. The unseaworthiness claim against the ship was rejected on the ground that the injury did not occur on navigable waters, or fall within the scope of The Admiralty Extension Act of 1948, 46 U.S.C. § 740 (1970).

Thus, under the locality test, injuries resulting from the same type of maritime activity and occurring in essentially the same manner will be treated differently in deciding jurisdictional questions. The test has only served to increase complication and uncertainty in the law. Regrettably, statutory changes, such as the Longshoreman's Act, have compounded the problem. See White, *The Admiralty Jurisdiction Adrift*, 28 U. Pitt. L. Rev. 635, 641 (1967).

47. 98 F. 998 (2d Cir. 1900).
48. 70 U.S. (3 Wall.) 20 (1866).
49. 98 F. at 999-1000.
50. *Id.* at 1000.
52. *Id.* at 240.
locality rule serve as further evidence of the test’s inadequacy. Perhaps the first judicial exception to the locality rule was made in *The Blackheath.* In that case recovery was allowed in admiralty because the structure damaged was an aid to navigation, although it was firmly attached to the land and arguably within the “extension of the land” rule. The court looked beyond locality, holding that the purpose and use of the structure were determinative. But the court did not attempt to explain how a navigational beacon, built on piles, differs substantially from a dock or wharf similarly supported.

Statutory changes to the locality rule have also been created.

It was early noticed that often a strict application of the locality test had the rather unsettling tendency of excluding from the admiralty jurisdiction torts very closely connected with activities obviously maritime, while at the same time including within that jurisdiction matters not even remotely connected with maritime commerce or navigation.

For this reason, Congress in 1948 passed the Admiralty Extension Act which enlarged admiralty jurisdiction to include all cases of damage caused by vessels on navigable waters. The Act effectively overruled

54. The “extension of the land” doctrine prevented recovery in admiralty for personal injuries which occurred on, or for property damage to, piers, bridges, wharves, and similar structures. *See generally* BENEDICT, *supra* note 4, § 128(a), at 354-56.
56. Another judicially-created exception to the locality rule was the “maritime but local” doctrine. This doctrine allows application of state death compensation acts irrespective of the locality of the tort, provided that the court finds the nature of the injury to be primarily a matter of local concern. *See generally* GILMORE, *supra* note 2, at 344-58; HANDBOOK, *supra* note 14, at 101-09.
57. The relationship between state legislative enactments and federal maritime law has been a difficult and persistent problem. The “maritime but local” doctrine attempted to strike a balance between the two, and the doctrine has been included in the Longshoremen’s Act. 33 U.S.C. § 903(a) (1970).
60. Palaez, *supra* note 10, at 23.
The Plymouth, although the locality test survived.

The judicial and congressional exceptions demonstrate a willingness to limit the locality test in the interest of public policy and were prompted by the test's inadequacy. Despite these exceptions, its inadequacies remain. *Davis v. City of Jacksonville Beach* held that admiralty had jurisdiction over a suit by a swimmer for injuries suffered when he was struck by respondent's surfboard. While the court admitted that the accident had no relation to shipping or maritime commerce, it reasoned that a surfboard is used upon the high seas or navigable waters and thus has an inherent potential for interfering with commerce. This is the sort of *reductio ad absurdum* to which the locality rule leads. In another recent case, a water skier was allowed access to maritime jurisdiction in an action against the boat operator who had towed him, for injuries suffered in a fall. Surely no one can assert that this suit had a substantial impact on the business of shipping. The court did not even pretend that the case involved potential maritime interference as did the *Davis* court, but merely applied the test mechanically.

Despite a growing body of precedent applying the locality test, it continues to be criticized as an historical anomaly, since such a rule is nowhere present in the sea codes from which we draw our maritime law.

"[L]ocality" ... is, to engage in understatement, a patent absurdity. ... [L]ines must be drawn. ... But the lines drawn ... should at the very least be rational. Locality as a criterion for admiralty jurisdiction ... has nothing ... to [recommend it]. ... It serves neither the needs of federalism

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60. 251 F. Supp. 327 (M.D. Fla. 1965).
61. Id. at 328.
64. A well-developed body of legal rules for dealing with air crashes presently exists. Such rules arose to deal with the needs of the airline industry and its passengers, and were based on policy considerations appropriate to that industry. *See* cases in W. Prosser, *Law of Torts* § 39, at 216 (4th ed. 1971). To treat crashes occurring on water differently from those on land causes non-uniform results in analytically similar situations; therefore, air crashes should not be admitted to admiralty.
nor the reasonable expectations of those concerned with maritime affairs.\textsuperscript{66}

\textbf{IN SEARCH OF A BETTER TEST}

In early cases, the Supreme Court adopted Justice Story's dictum in \textit{DeLovio v. Boit},\textsuperscript{67} and decided that the test for tort jurisdiction in admiralty depended on the locality of the tort.\textsuperscript{68} However, the court has never treated the locality test as exclusive.\textsuperscript{69} As a result, a difference now exists between the Supreme Court and some circuits which retain only the locality test,\textsuperscript{70} and other circuits which reject locality in favor of newer tests.\textsuperscript{71}

The first new test to be judicially adopted was the "locality plus

\begin{itemize}
\item \textsuperscript{66} Swain, \textit{supra} note 27, at 84. \textit{Accord, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts} § 1316, Comment (1968) [hereinafter cited as ALI].
\item \textsuperscript{67} 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Story, Circuit Justice).
\item \textsuperscript{68} The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1866).
\item \textsuperscript{69} If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters, was quite sufficient. Atlantic Transport Co. of W. Va. v. Imbrovek, 234 U.S. 52, 62 (1914). \textit{See also Gilmore, supra} note 2, at 22 n.78; \textit{Robertson, supra} note 8, at 120-21.
\item \textsuperscript{70} The efficacy of the locality test as the sole test for tort jurisdiction was early questioned. Campbell v. Hackfield and Co., 125 F. 696 (9th Cir. 1903). \textit{See also Benedict, supra} note 4, § 127, at 351; Black, \textit{supra} note 6.
\item \textsuperscript{71} In his "celebrated doubt", Professor Benedict stated with reference to the locality test that
\item \[i\]t has nevertheless been doubted whether the civil admiralty jurisdiction, in cases of tort, does not depend upon the relation of the parties to some ship or vessel and embrace only those tortious violations of maritime right and duty which occur in relation to vessels to which the admiralty jurisdiction in cases of contract applies. If one of several landsmen bathing in the sea should assault or imprison or rob another, it has not been held that admiralty would have jurisdiction of an action for the tort.
\item \textit{Benedict, supra} note 4, § 127, at 351.
\item Extending this idea, Professor Black has proposed the following test for jurisdiction in admiralty:
\item (1) In contract, all those cases involving the enforcement, policing, or adjustment of business arrangements as a practical matter primarily concerned with sea, lake and river transport. (2) In tort, all those cases seeking relief for tortious conduct with respect to the subject-matter of (1), or for injuries by or to vessels or other maritime objects, or injuries to persons taking place in connection with the conduct of the business or shipping.
\item \textit{Black, supra} note 6, at 274.
\end{itemize}
maritime connection" test. Courts applying this test assert that location of the tort on navigable waters is merely prima facie proof of admiralty jurisdiction and only torts which also deal with maritime matters are properly considered. Application of the locality-plus test has dictated denial of jurisdiction for injuries suffered by swimmers and divers which would have been within admiralty under the locality test. Nevertheless, it is doubtful whether the locality-plus test is a substantial improvement since the court never reaches the issue of maritime connection unless the locality criterion is first satisfied. Thus, many cases deserving consideration in admiralty are excluded by this test. It is clear that the locality-plus test is a compromise effort, attempting to consider the needs of the maritime industry while still deferring to the historical test.

Another proposed standard is the maritime connection test. This test focuses on connection alone to determine tort jurisdiction, allowing a determination of whether the special duties, remedies, and substantive rules of admiralty should apply. Abandoning locality enables the extension of admiralty jurisdiction to cases like The Plymouth without legislation. The test also allows flexibility to adjust the scope of admiralty jurisdiction to meet the changing needs of technology and newly emerging policy considerations.

Despite its potential for confining tort jurisdiction to cases having a
clear impact on the maritime industry, the maritime connection test has been criticized as being difficult to apply, uncertain, and complicated. This criticism has been partly motivated by the failure of proponents of the maritime connection test to adequately develop guidelines for its application. The failure accounts for judicial reluctance in accepting the test, since similar failures led to lack of uniformity under the locality test.

**Peytavin v. Government Employee’s Insurance Co.**

The substantial maritime connection test was finally refined by the fifth circuit in *Peytavin v. Gov’t Employee’s Ins. Co.* There, the plaintiff was waiting in his car to purchase tickets for a ferry crossing. The car was resting on a floating pontoon, moored to the shore, from which the ferry sold its tickets. While driving onto the pontoon the defendant’s car struck the plaintiff’s car. The unique situation of an automobile accident on navigable waters afforded the court the opportunity to investigate the three existing tests for admiralty jurisdiction.

Since the injury occurred on a pontoon floating in navigable waters, application of the strict locality test would require that admiralty entertain the case. But the court refused to follow that test, reasoning that:

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79. *Over Torts*, *supra* note 34, at 211; *Admiralty Tests*, *supra* note 34, at 172. It has been suggested constitutional problems might arise if “maritime connection” is used to allow torts committed totally on land to fall within admiralty. *Id.* at 173. But this argument loses much of its force when it is recognized that cases occurring totally on land have already been decided in admiralty. *See, e.g.*, Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 306 F.2d 369, *modified on rehearing*, 308 F.2d 570 (5th Cir. 1962); United States v. Matson Navigation Co., 201 F.2d 610 (9th Cir. 1953); Costello v. Argonaut Trading Agency, Inc., 156 F. Supp. 398 (S.D.N.Y. 1957). Furthermore, if a suit is clearly connected to admiralty concerns, no constitutional problems should arise.

81. 453 F.2d 1121, 1126 (5th Cir. 1972).

83. The problem raised by the facts of *Peytavin* is similar to that suggested by the hypothetical of Professor Benedict which formed the basis for his “celebrated doubt.” *See* note 69 *supra*. A similar hypothetical was also suggested by Justice Brown, who questioned whether a libel or a slander circulated on board a ship would give rise to admiralty jurisdiction. *Brown, supra* note 10, at 8.

Analytically, the automobile accident between two passengers on a floating pontoon, arguably a vessel, is similar to the hypotheticals mentioned because no person associated with admiralty is involved. Thus, as Justice Brown states, “such cases are peculiarly matters within the jurisdiction of common law courts, and a trial by jury.” *Id.*
Application of the "strict locality" test fails to provide any clear guidance because the rule is only as precise as the court's ability to determine "the location." Since the accident occurred on navigable waters while maritime facilities were being used, the locality plus maritime connection test would have arguably placed the case within admiralty jurisdiction. However, for similar reasons the court rejected this test, reasoning that this standard led to the "combined confusion of the strict location test and the question of what is sufficient minimum maritime connection."

Turning to the maritime connection test, the court was faced with the problem of determining what constitutes sufficient connection. While noting that most cases require only a minimum connection, the court insisted that "mere use" of maritime facilities would not justify admiralty jurisdiction. Accordingly, the court insisted that a substantial relation to maritime affairs was essential. However, the court did not stop at merely strengthening the requirements of the maritime connection test, but also set forth five factors particularly relevant to tort cases: (1) the facilities in use; (2) the relationship of the parties; (3) the activities of the parties at the time of the tort; (4) the nature and apparent cause of the accident; and (5) the nature of the injuries sustained. These factors were then utilized to determine whether a substantial maritime connection existed.

As to the first factor, it is arguable whether the facilities in use in *Peytavin* were truly "maritime". The tort occurred while the parties were waiting to purchase a ticket to board the ferry. Although the facilities were somewhat related to maritime concerns, the facts are no different than the collision of two automobiles waiting to purchase tickets to a parking garage. Also since the tort occurred between two passengers, and not between a passenger and someone representing the maritime

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84. 453 F.2d at 1126.
85. *Id.* at 1123. See also Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967).
86. 453 F.2d at 1126.
88. 453 F.2d at 1126. The *Peytavin* approach only considers locality as it relates to the use of a maritime facility; the notion of location is not controlling. Location is neither a prima facie requirement, as in locality-plus, nor a controlling consideration, as in strict locality. It should be noted, however, that location is not irrelevant in every case. Rather, it can be considered in determining whether a "substantial maritime connection" exists.
89. 453 F.2d at 1126-27.
90. *Id.*
industry, the court concluded that no substantial maritime connection could be found in the relationship of the parties. Finally, the accident did not arise because the pontoon was unseaworthy, or because it was negligently rammed by a ship or other vessel. Instead, the nature of the injury and the sequence of events showed that the accident could also have occurred on land in a variety of situations. Therefore, the last three factors also failed to establish a substantial maritime connection.

By focusing on the facts and circumstances of each case, the Peytavin formulation seems to achieve the flexibility necessary to insure that maritime jurisdiction will be extended only to those cases to which the policies underlying article III, § 2, apply. The correctness of this assumption may be determined by comparing the fifth circuit's approach with the other tests.

**Practical Applications of Peytavin Factors**

Had the Peytavin factors been applied in *The Plymouth* the need for the Admiralty Extension Act would have been obviated. The facility involved, a dock where a ship was berthed, was substantially related to maritime concerns. Since the fire began on the vessel while it was docked, the activity was sufficiently maritime. The relationship of shipowner to the warehouseman who stored maritime cargo was also maritime in nature. Because the fire spread from the ship to the dock, and then to the warehouse, both the nature of the tort and the damage which resulted were substantially related to maritime concerns. A shipboard fire, whether at sea or in port, is a common risk in the maritime industry and should be handled under maritime law. Therefore, an analysis of *The Plymouth* under the substantial connection test used in Peytavin indicates that the plaintiff should have been granted maritime jurisdiction.

Substantial connection to maritime commerce can also be found in *The Blackheath*. There, the damage occurred when a ship collided with a navigation beacon. Thus, both the facility and the activity were distinctively maritime. The relationship of shipowner to the government (acting as the regulator of navigable waters) also shows a substantial maritime connection. A collision on navigable waters is inherently maritime, as is the nature of the injury. Clearly this was a maritime risk which can be expected to fall within admiralty. Applying Peytavin produces

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91. *Id.* at 1127.
92. *Id.*
93. 70 U.S. (3 Wall.) 20 (1866).
95. 195 U.S. 361 (1904).
the same result without necessitating the creation of a special exception to the prevailing rule.

Similarly, an application of the Peytavin approach would have secured uniform results in T. Smith and Son v. Taylor and other cases of injuries suffered by longshoremen while unloading ships. The activity is maritime because it is an integral part of the transportation process and involves the use of maritime facilities. The occupations of the parties, shipowner and longshoremen, and their relationship to each other reflect a substantial maritime connection. Whether the chain of causal events was ship-to-dock-to-water as in T. Smith or from ship-to-wharf, the risk involved is a hazard with which the industry is familiar and concerned. Under the Peytavin approach all such cases are within admiralty.

Cases like Davis, which have presented courts with so many difficult problems and which result in bizarre decisions, can be uniformly and easily settled by the use of the Peytavin factors. That case involved the use of a public swimming area. The facility in use is by definition excluded from maritime commerce, and recreational pursuits cannot be considered a maritime activity. The two "civilians" in Davis bore no relation to the maritime industry, and the nature of the accident and the injuries suffered show no maritime connection. Therefore, admiralty jurisdiction should have been denied.

The Peytavin factors succeed where all previous tests have failed. While each of the factors will not always favor the same result in a given case, the court by balancing the factors can limit admiralty jurisdiction to cases in which its purposes are served. Balancing is a task with which the courts are familiar. In a very close case the final determination may depend on another more general policy of judicial administration. For example, the final balance may sometimes be struck by con-

96. 276 U.S. 179 (1928).
98. Similarly, Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963), cert. denied, 375 U.S. 940 (1963), and the other airplane cases should also fall outside admiralty jurisdiction. The facilities (airplanes and airports) and the activity of flying are not related to maritime commerce. Also, the relation of the passenger to the airplane is not in any way connected to maritime concerns. The chain of events, from the negligent inspection to the crash, shows no substantial maritime connection. Finally, the deaths result from the plane crash, not from drowning, and have only a slight maritime connection.

99. The Peytavin test offers an adequate method for analysis of the cases involving pier-based injuries to longshoremen. Use of the Peytavin test in Victory Carriers, Inc. v. Law, 404 U.S. 202, rehearing denied, 404 U.S. 1064 (1971), would have placed the case outside maritime jurisdiction. In Victory Carriers, a longshoreman was injured on dock while moving cargo which later was to be loaded onto the ship. The accident occurred due to a defect in a forklift. Such an accident is a risk which the shipowner cannot avoid because the defective piece of equipment is not within his
cerns about the impact that a particular case will have on admiralty jurisprudence and about ease of administration. It appears, however, that in the majority of cases the proper jurisdictional determination can be clearly and easily reached by use of the *Peytavin* factors.

**CONCLUSION**

The *Peytavin* factors approach is no panacea. However, court's should not wait for a perfect test. As Professor Black has pointed out:

> I hope we have all lived too long to think that any verbal description of jurisdictional limits is going to result in anything better than a fairly discernable line. The point is that, in drawing the line on the basis of practical relations with an actually operative industrial complex, we are at least trying to draw it right, which is more than can be said of the present position.\(^{100}\)

Also, the *Peytavin* test is not logically complete nor obviously better than any other test; but it is a turning point away from the use of abstract formulations and towards a practical application of concrete guidelines. The factors set forth in the opinion are a first step. These factors must be analyzed and balanced against the concerns of the industry to determine whether the particular case under consideration is best decided under the admiralty or civil jurisdiction. For example, one could point out in *Peytavin* that an automobile collision, unlike a collision between vessels, has been adequately provided for under civil jurisdiction. A special body of rules pertain to automobile accident cases, just as special rules based on the needs of the maritime industry have been developed for application in admiralty. Such special rules for cases involving automobile accidents should take precedence, regardless of where they occur, unless some substantial relation to maritime concerns exists.

Courts should also consider other general policy guidelines. The expectations of the parties as to which laws will govern their actions is one such consideration. Parties often rely on the fact that admiralty laws will apply to their transactions. The decision to engage in maritime commerce may be based in part on the belief that admiralty law will control. Thus, there is only a tenuous relationship between the injury suffered and maritime concerns. As the dissent points out, it is difficult to draw the jurisdictional line when at one moment a longshoreman may be working with the ship's gear and at the next be using shore-based equipment. Therefore, the determination of the jurisdictional question must be resolved on the basis of policy considerations. If, as in *Victory Carriers*, the court decides that civil remedies are sufficient, it may refuse admiralty jurisdiction.

\(^{100}\) Black, *supra* note 6, at 280.
be applied if some hazard of the maritime industry should occur. Similarly, the court should consider whether the risk involved is one expected in the maritime industry. If the risk is peculiar to maritime activity, the court is justified in hearing the case on the admiralty side.

The only situations in which the Peytavin approach will deviate from locality involve parties and activities unrelated to shipping. Thus, in the swimming and surfing cases admiralty jurisdiction will be denied. Denying admiralty jurisdiction to such suitors is not unnecessarily harsh since the claim can be maintained elsewhere. If the disappointed claimant is able to obtain federal civil jurisdiction, Federal Rule 9(h) allows him to do so merely by amending his admiralty pleading. And the "saving clause" of the Judiciary Act preserves any other remedies to which he is entitled. Therefore, no hardship exists which should prevent the limitation of admiralty tort jurisdiction to cases related to the special concerns of the maritime industry.

Thomas L. Pytynia

102. An Act to Establish the Judicial Courts of the United States § 9, ch. 20, § 9, 1 Stat. 73 (1789), as amended 28 U.S.C. § 1333 (1970). The "saving clause" allows some cases to be tried in state courts because the "exclusive jurisdiction" of the admiralty courts has been interpreted to extend only to cases of maritime liens in an in rem action. The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867). A suitor with a personal claim which is enforceable by a personal action in admiralty can elect whether to bring suit in the common law state court, in admiralty, or, assuming proper jurisdictional grounds, in federal court on the civil side. Rounds v. Cloverport Foundry and Machine Co., 237 U.S. 303 (1915); Knauff, Stout and Co. v. McCaffrey, 177 U.S. 638 (1900). See generally Benedict, supra note 4, § 23, at 38-42; Gilmore, supra note 2, at 33-36; Handbook, supra note 14, at 22, 24; Robertson, supra note 8, at 18-27.