ADMIRALTY—TORTS—A PERMANENTLY MOORED VESSEL LOCATED IN NAVIGABLE WATERS, THOUGH NO LONGER INVOLVED IN COMMERCE, SUPPLIES THE NECESSARY MARITIME NEXUS FOR INVOCATION OF ADMIRALTY TORT JURISDICTION USING THE "LOCALITY PLUS" TEST.

On September 26, 1971, plaintiff was injured while an invited guest of a club which was holding a party on the defendant ship Star of India. It was alleged that the injury was sustained while plaintiff descended a metal stairway serving as the only regularly maintained access from shore. No reason was given why the fall occurred or the extent of injuries. The defendant ship was permanently moored[1] in North San Diego Bay and served as a museum to allow interested persons to view the accomodations of her nineteenth century passengers.[2] She had not been engaged in commerce since at least 1923, and was not subject to the Coast Guard inspection and navigation laws, having been classified by the Coast Guard Officer in Charge of Marine Inspection as substantially a land structure in March, 1969. Having been admitted that no diversity jurisdiction existed,[3] the sole issue raised by defendant's motion to dismiss was whether the suit was properly within the admiralty jurisdiction of the United States District Court for the Southern District of California.[4] *Held*, motion to dismiss denied and motion to strike on grounds of immateriality denied. A vessel, although permanently moored, removed from commerce for more than forty years, and not subject to Coast Guard inspection and navigation laws, supplies the necessary maritime nexus for invocation of admiralty tort jurisdiction. *Luna v. Star of India*, 356 F. Supp. 59 (S.D. Cal. 1973).

Article III, section 2 of the United States Constitution gives the federal judiciary power over maritime torts, but says nothing as to the substantive law to be applied in such cases,[5] causing Mr. Justice Holmes' statement that ". . . the precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history"[6] to retain much significance. Some concrete observations can be made concerning the invocation of admiralty jurisdiction, how-

---

[1]Coast Guard inspectors accepted the evaluation that the moorings were of a permanent nature and could not be removed without tools that would be unavailable "to the ordinary mischief maker."

[2]The Star of India was constructed at Ramsey in the Isle of Man in 1863. In 1923, she was towed to San Diego for preservation as an historical relic, but no significant restoration was begun until 1959. Owned by the Maritime Museum Association of San Diego, the Star of India has since served as a museum and is the oldest merchant vessel afloat.

[3]28 U.S.C. § 1332 (1948).

[4]28 U.S.C. § 1333 (1948) provides that district courts shall have original jurisdiction of "any civil case of admiralty or maritime jurisdiction." This section has been generally taken to mean that admiralty tort jurisdiction depends upon the locality where it occurred, not upon the nature of the tort. Chapman v. City of Grosse Point Farms, 385 F.2d 962, 963 (6th Cir. 1967).

[5]G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 40 (1957) [hereinafter cited as Gilmore].

[6]The Blackheath, 195 U.S. 361, 365 (1904).

ever. It may be said with certainty that admiralty is supposed to serve the national interest by providing a uniform means of supervising the maritime industry.[7] Uniformity in this area has proven to be a necessity for the transaction of commerce among nations, and, at the time of the writing of the United States Constitution, the founding fathers recognized the need for consistency in dealing in international trading markets.[8] Uniformity could not have been ensured by looking to state courts under the Articles of Confederation, so a separate federal system emerged,[9] becoming in our law the sole separately created judicial tribunal for the policing and supervision of a single industry.[10] Ideally, the jurisdiction should relate directly to the business of commerce conducted on navigable waters, and it should remain flexible and grow as commercial necessity so dictates.[11] However, most attempts to determine the limits of admiralty jurisdiction have been undertaken not on the basis of practical commercial maritime significance, but rather on the basis of historical and metaphysical concepts.[12]

Almost unanimously, American courts have relied to some extent on the strict locality test in determining admiralty tort jurisdiction.[13] The strict locality test is basically stated to mean that the tort must occur upon navigable waters to be considered maritime and within admiralty jurisdiction.[14] In determining whether the tort is maritime in nature, courts have viewed the term locality as meaning where the negligent conduct occurred, where the actual injury took place, or where the result of the negligent conduct first came to rest.[15] These factual determinations have led to inconsistent locality decisions, causing the most important aspect of admiralty tort jurisdiction—*i.e.*, uniformity—to be distorted.[16] *DeLovio v. Boit*,[17] the first test of the constitutional requirement of federal judicial power over maritime cases, developed a double standard for maritime problems. English admiralty law had put all land-made

---

[7]Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 261 (1950) [hereinafter cited as Black].

[8]Note, *New Guidelines for Admiralty Tort Jurisdiction*, 48 IND. L.J. 87 (1972) [hereinafter cited as Note].

[9]*Id.*

[10]Black, *supra* note 7, at 260.

[11]McGuire v. City of New York, 192 F. Supp. 866, 871 (S.D.N.Y. 1961); "Briefly, the admiralty jurisdiction . . . extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce . . ." Gilmore, *supra* note 5, at 28-29.

[12]Black, *supra* note 7, at 266; In The Blackheath, 195 U.S. 361 (1904), the Court concluded the basis of admiralty jurisdiction could be located by historical glances at English and French law.

[13]Peytavin v. Government Employees Insurance Co., 453 F.2d 1121, 1122 (5th Cir. 1972); *see* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). *See also* Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469, 476 (1922).

[14]Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); The Admiral Peoples, 295 U.S. 649, 651 (1935); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943).

[15]Note, *supra* note 8, at 92; *see* G.H. ROBINSON, HANDBOOK OF ADMIRALTY LAW 77 (1939).

[16]*Id.*

[17]7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

contracts outside of admiralty jurisdiction, thus greatly restricting this jurisdiction, but Justice Story, feeling the restriction was not necessary, held in *DeLovio* that locality was not the test for contract cases, and jurisdiction was determined by "the maritime relation of its subject matter."[18] However, he considered the determining factor in deciding whether a tort fell under the admiralty jurisdiction as being the location where the tort occurred.[19]

Full impact of the locality test, however, was not felt until the Supreme Court was presented with *The Plymouth*.[20] It was held that admiralty jurisdiction was not proper regarding damages to a wharf caused by a fire initiated on board a ship. Even though the damage was clearly caused by a maritime source, the Court held that because the damage was inflicted upon land, the claim was not within admiralty jurisdiction.[21] *The Plymouth* has served as a foundation for many subsequent cases which have seemingly held location as strictly controlling—*i.e.*, if the tort does not occur upon navigable waters, it *is not* within the admiralty jurisdiction,[22] and if it does occur upon navigable waters, regardless of its connection with maritime activities, it is within admiralty jurisdiction.[23] By reliance on the basic doctrine of strict locality, courts have been unable to attain the goal for which admiralty was initially formulated—a special tribunal geared to the smooth functioning of international commerce.[24] By referring to an arbitrary locality rather than to the practical relation of commerce to the sea, the strict locality test causes results which are in many cases contrary to the declared goals of admiralty jurisdiction.[25]

Although the fact remains that courts have relied on the strict locality theory in reaching decisions on admiralty jurisdiction, in reality, as the commentators note, jurisdiction has very seldom been upheld on the basis of locality alone.[26] When no maritime connection or nexus was available, federal courts normally have refused to take admiralty jurisdiction.[27] In *Atlantic Transport Co. v. Imbrovek*,[28] the Supreme Court, when asked to determine whether locality alone would support admiralty jurisdiction, skirted the issue by saying merely that *if* additional factors, other than the locality of the wrong, are needed to

---

[18]*Id.* at 444.

[19]*Id.*

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

[21]*Id.*

[22]Victory Carries, Inc. v. Law, 404 U.S. 202, 205 (1971); Stamp v. Union Stevedoring Corporation, 11 F.2d 172 (E.D. Pa. 1925).

[23]Davis v. City of Jacksonville Beach, Florida 251 F. Supp. 327 (M.D. Fla. 1965); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963).

[24]Palaez, *Admiralty Tort Jurisdiction—The Last Barrier*, 7 DUQUESNE L. REV. 1, 36 (1968).

[25]Black, *supra* note 7, at 264.

[26]Smith v. Guerrant, 290 F. Supp. 111, 112 (S.D. Tex. 1968); Peytavin v. Government Employees Insurance Co., 453 F.2d 1121, 1123 (5th Cir. 1972).

[27]Smith v. Guerrant, 290 F. Supp. 111, 112 (S.D. Tex. 1968); *See* Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903). The first departure from the strict locality test was made in this case.

[28]234 U.S. 52 (1914).

give the federal courts jurisdiction, the relation of the wrong to maritime service, to navigation, and to commerce on navigable waters were quite sufficient.[29] The broader question of locality was not determined by the Supreme Court until 1972 in *Executive Jet Aviation, Inc. v. City of Cleveland*[30] (see *infra* p.243). An additional restriction on the strict locality test was the extension of land doctrine, eliminating from the admiralty jurisdiction injuries occuring on bridges, piers, etc.[31] The rule, as stated in *Hastings v. Mann*,[32] is ". . . the structure must be firmly attached to the land. A vessel moored to a dock does not become an extension of the land nor do other structures secured to the shore by cables, or other temporary means."[33] Various other exceptions to the strict locality rule are also apparent.[34]

Recently, however, a steadily growing minority of courts have tended to disregard strict locality in favor of the locality plus test of admiralty tort jurisdiction.[35] Rather than give mere lip service to the strict locality test by basing the decision on the situs of the injury which clouds the real issue behind admiralty tort jurisdiction, this test focuses on the fact that it is a relationship to maritime activity and not locations that should be considered by the admiralty court.[36] Location standing by itself should be deemed irrelevant, and only the continued existence of the maritime industry should be considered,[37] thereby requiring tort claims involving noncommercial users of navigable waters to be adjudicated by fully qualified land jurisdictions. The feeling of these courts has been that, completely lacking a commercial interest, these cases have no need of a uniform system of law, and the burden should be on the tort law of individual states, where adequate remedies would certainly be available.[38] The attitude appears to center around the idea that to do otherwise ". . . would do violence to the concepts of admiralty jurisdiction when viewed as a totality."[39]

---

[29]*Id.* at 61.

[30]409 U.S. 249 (1972).

[31]T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928); Rodrigue v. Aetna Casualty & Surety Co. 395 U.S. 352 (1969).

[32]340 F.2d 910 (4th Cir. 1965), *cert. denied*, 380 U.S. 963 (1965).

[33]340 F.2d 910, 911 (4th Cir. 1965).

[34]The Admiralty Extension Act of 1948, 46 U.S.C. § 740 (1948), broadened the strict locality of *The Plymouth* to ". . . include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land . . . ;" the Jones Act, 46 U.S.C. § 688 (1920), was extended to injuries to seamen on land in O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36 (1943).

[35]McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Smith v. Guerrant, 290 F. Supp.111 (S.D. Tex. 1968); Peytavin v. Government Employees Insurance Co., 453 F.2d 1121 (5th Cir. 1972); Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972).

[36]Pelaez, *supra* note 24, at 2, 3.

[37]*Id.* at 42.

[38]Comment, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction?*, 1968 U. ILL. L.F. 95, 103 (1968).

[39]Chapman v. City of Grosse Pointe Farms, 385 F.2d 962, 966 (6th Cir. 1967).

In *McGuire v. City of New York*,[40] a bather was injured while in the waters along a public beach. The district court held that the injury was not a cause of action recognized in admiralty, as the claim alleged ". . . an ordinary tort . . . no different . . . than if the injury had occurred on the sandy beach along the water line."[41] To attempt to try the case in admiralty would be ". . . to misinterpret the nature of admiralty jurisdiction."[42]

A similar situation was to be found in *Chapman v. City of Grosse Pointe Farms*,[43] where a claimant was denied access to admiralty when he dove from a pier into eighteen inches of water. Admitting that under the strict locality test the action would indeed be proper in admiralty, the court held that ". . . jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters."[44]

Perhaps the culmination of the process of limiting access to admiralty tort jurisdiction by use of the locality plus test can be found by reference to the 1972 fifth circuit case of *Peytavin v. Government Employees Insurance Co.*[45] and the 1972 Supreme Court case of *Executive Jet Aviation, Inc. v. City of Cleveland.*[46] In *Peytavin*, which "appears to have finally set out a test which enables accurate jurisdictional classification,"[47] the plaintiff, unable to show diversity of citizenship, sought to invoke the district court's admiralty jurisdiction for injuries sustained in an automobile accident when his vehicle was hit in the rear end by that of the defendant's. Plaintiff was parked on a floating pontoon at a ferry landing waiting to purchase tickets to board the ferry when hit by the defendant. The district court dismissed the suit, holding that it was wrongfully brought in admiralty by virtue of the land extension doctrine.[48] The Court of Appeals affirmed, although for different reasons. After reviewing various cases in support of different theories,[49] the court enunciated the rule that to invoke admiralty tort jurisdiction, a substantial connection with maritime activities or interests must be shown, and the plaintiff did not meet this burden.

In *Executive Jet Aviation, Inc. v. City of Cleveland*,[50] involving the crash of a jet plane into Lake Erie due to the ingestion of sea gulls into the plane's engines, the Supreme Court affirmed the decision of the Court of Appeals for

---

[40]192 F. Supp. 866 (S.D.N.Y. 1961).

[41]*Id.* at 871.

[42]*Id.* at 872.

[43]385 F.2d 962 (6th Cir. 1967).

[44]*Id.* at 966.

[45]453 F.2d 1121 (5th Cir. 1972).

[46]409 U.S. 249 (1972).

[47]Note, *supra* note 8, at 87.

[48]341 F. Supp. 1286 (1971).

[49]The court credited the *Chapman* case for the locality plus test, but said the case rested on the idea of a sufficient minimum maritime connection, causing confusion as to what in fact would be termed sufficient. 453 F.2d 1121, 1126 (5th Cir. 1972).

[50]409 U.S. 249 (1972).

the Sixth Circuit dismissing the action for lack of admiralty jurisdiction.[51] In contrast to *Peytavin's* substantial maritime connection, the Supreme Court in this case determined that there must be ". . . a significant relationship to traditional maritime activity."[52] Mr. Justice Stewart, delivering the opinion of the Court, said the strict locality test was ". . . established and grew in an era when it was difficult to conceive of a tortious occurence on navigable waters other than in connection with a water vessel,"[53] but difficulties with the test are found in ". . . cases where the maritime locality of the tort is clear, but where the invocation of admiralty jurisdiction seems . . . absurd."[54]

The court in *Luna v. Star of India*[55] accepted the proposition that the locality plus test "appropriately governs."[56] The question that remained before the court was whether the plaintiff ". . . alleged a sufficient maritime nexus to bring her suit within the ambit of admiralty jurisdiction."[57] Despite the evidence before the court that the defendant ship had been ". . . withdrawn from commerce for some forty years and . . . exempted from compliance with the inspection and navigation laws by the Coast Guard, and in view of the owner's express intent to maintain her as a maritime museum . . . ,"[58] the court found her to be considered a vessel within the statutory definition of 1 U.S.C. § 3.[59] The court found it interesting to note that the supervisor held himself out to be the "Master"[60] of the ship, and felt that although she contained maritime artifacts, her main function was to allow visitors ". . . the unique experience of trodding the decks and inspecting the lofty rigging of this old sea voyager."[61] Rejecting the contention of the defendant that the Star of India was functionally not a vessel because of having been withdrawn from commerce and navigation, the language of 1 U.S.C. § 3 that a vessel is ". . . every . . . water craft . . . capable of being used, as a means of transportation on water" was considered controlling, due to the fact that plaintiff was merely a visitor on board the ship. Had the question been whether the plaintiff was a seaman for purposes

---

[51]The 6th Circuit held that ". . . the alleged tort in this case occurred on land before the aircraft reached Lake Erie . . . ," thus, consideration of ". . . the question of maritime . . . nexus discussed . . ." in Chapman was not necessary. 448 F.2d 151, 154 (6th Cir. 1971).

[52]409 U.S. 249, 268 (1972).

[53]*Id.* at 254.

[54]*Id.* at 255.

[55]356 F. Supp. 59 (S.D. Cal. 1973).

[56]*Id.* at 63.

[57]*Id.*

[58]*Id.*

[59]"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." *Id.* By finding the Star of India a vessel, the court held that a sufficient nexus would be present, using Judge Dawson's reasoning in *McGuire*, 192 F. Supp. at 871: "Admiralty was the result of commerce on the high seas; the commerce made possible by sailing vessels . . . In very general terms, admiralty . . . . relates to things occurring on or to vessels or as a result of the employment of vessels." 356 F. Supp. 59, 63 (1973).

[60]"In this court's experience, museums are run by curators; ships are run by masters." *Id.* at 66.

[61]*Id.*

of the Jones Act,[62] the stricter definition of vessel found in 46 U.S.C. § 713 would have been applied by the court.[63] Being thus considered a vessel, the district court found that the necessary maritime nexus for the invocation of admiralty tort jurisdiction was present.

The court in *Luna* had an excellent opportunity to supplement the results of *Peytavin* and *Executive Jet* and further limit the scope of admiralty tort jurisdiction by strictly construing a maritime nexus as contemplating a *substantial* or *significant* relation to maritime commerce. Circumstances surrounding *Luna* were sufficient to show that there was no actual relation to such commerce. The significant factors necessary to show this were admitted by the court. The Star of India had been removed from commerce for more than forty years, permanently moored, and classified as a land structure by the Coast Guard. Invocation of admiralty jurisdiction was not called for in this case. The state courts are fully qualified to handle a tort case of this type since there is no connection to the original purposes of admiralty and the need for a uniform system of law in this case becomes unnecessary. The move by courts away from the strict locality test is realistic and proper, but unless courts reasonably construe what constitutes a maritime nexus so as to act practically rather than artifically in these situations, the problem evident in *Luna* will continue to plague admiralty jurisdiction and will effectively emasculate the more progressive locality plus test.

E. Bruce Mather

---

[62]46 U.S.C. § 688 (1920).

[63]"The term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river." Revised Statute, § 4612 [46 U.S.C. § 713 (1946)].