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Admiralty Tort Jurisdiction—The Last Barrier

Alfred S. Pelaez†

INTRODUCTION

The many advantages the admiralty gives to an injured plaintiff, particularly if he can be brought within the scope of those remedies traditionally reserved to seamen,¹ has long been the envy of lawyers whose shore-bound client's causes are often subjected to a confusing and conflicting array of local laws and procedures. A plaintiff within the admiralty jurisdiction can, for instance, properly commence his action in any district wherein he can obtain service of process upon the defendant or upon the res against which his maritime lien attaches, and need not worry about such nebulous concepts as "doing business."² Furthermore, he need not worry about the uncertainties currently

¹ Only seamen are entitled to benefit from the provisions of the Jones Act (discussed in the text beginning at note 93, infra) and the doctrine of maintenance and cure (discussed, in the text beginning at note 88, infra). Seamen and those performing the traditional tasks of seamen may benefit from the maritime doctrine of unseaworthiness. (See the discussion beginning in the text at note 101, infra.) All others deemed within the scope of the admiralty jurisdiction for a particular purpose may benefit from most of the remaining substantive, jurisdictional and procedural advantages given to maritime claimants.

² The rule that both jurisdiction and venue are proper in the admiralty in any district wherein the defendant can be served with process or in which the offending res can be attached, does not preclude a maritime claimant from making use of any mode of service of process authorized by F.R.C.P. 4(e). If service is so made, admiralty venue will also be proper. See the discussion in 7A J. Moore, Federal Practice ¶ .66, at 449 (2d ed. 1966) clearly illustrating that the 1966 coalescence of the civil and maritime procedure did not affect the more liberal maritime venue requirements.
prevalent because of the rejection of the "vested rights" approach in solving choice of law problems—he knows that, by remaining within the jurisdiction of the admiralty, both the substantive and procedural law applicable to his claim will be uniform, regardless of the forum ultimately selected. Even if he proceeds outside the admiralty, he will take with him many of the best features of that law, including its doctrines of comparative negligence and laches. Finally, and perhaps most importantly, in almost all instances the choice whether to proceed within the admiralty jurisdiction of a federal district court or outside that jurisdiction is made by the plaintiff after he has determined the detriments and benefits of each choice. It is this flexibility, and the ability to use or not use the jurisdictional and venue advantages of the admiralty as best suit a particular plaintiff's purpose, that is, undoubtedly, the greatest single inducement to having a claim characterized as maritime.

Because of the great impact this initial characterization of a claim as maritime or non-maritime can have on the ultimate rights and liabilities of the parties involved, one would think that the criteria used in making such a determination have undergone thorough analysis and study. In fact, nothing could be further from the truth. Our courts almost uniformly invoke, or refuse to invoke, the jurisdiction of the admiralty in matters of tort following the application of a single criterion—the situs of the injury—which, in actuality, should be almost, if not entirely, irrelevant. And, to overcome the more obvious bad results that such a "head in the sand" approach all too frequently has produced, the courts and the legislature have upon occasion "extended" or "expanded" the admiralty tort jurisdiction—again, usually, without first determining why such an extension was really required and without providing guidelines for its further application. In creating such "exceptions" to the rule premised on the situs of the injury, however, the courts and the legislature have in all instances illustrated, even if inadvertently, that it is a relationship

3. This unique flexibility is provided by the provisions of the Saving to Suitors Clause, originally a part of the original Judiciary Act of 1789 and, as amended, today contained in 28 U.S.C. § 1333 (1964). This clause, while giving to the federal district courts "exclusive original cognizance" of all admiralty and maritime causes, saves to suitors "in all cases all other remedies to which they are otherwise entitled." This has been construed as giving state courts and federal courts in their non-maritime capacity (providing an independent basis of federal jurisdiction exists) concurrent jurisdiction with the admiralty in virtually all but in rem actions. See the discussion of the Saving Clause in 7A J. Moore, Federal Practice ¶.210, at 2201-2210 (2d ed. 1966).
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to maritime commerce, and not location, upon which the admiralty jurisdiction must logically rest.

The remainder of this article, by focusing attention upon (1) the weak historical and precedential foundations of the locality criterion, (2) the inequities it all too frequently causes, and (3) the obvious connection of all the rule's extensions to the perpetuation of maritime commerce, has as its goal the encouragement of the courts' creation of a jurisdictional rule consistent with the present concepts of judicial functionalism as tempered by the historical purposes of the admiralty. Whether the courts accept the challenge will determine if the last remaining barrier to the admiralty jurisdiction is, after nearly two-hundred years, to be removed.4

THE ESTABLISHMENT OF DIFFERENT JURISDICTIONAL TESTS FOR CONTRACTS AND TORTS

The constitution of the United States provides that the judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction".5 It does not, however, attempt to define what is meant by that phrase nor point to a ready reference by which the boundaries of the admiralty jurisdiction can be determined.6 Consequently, and for reasons not altogether clear even today, the basis in the United States for admiralty jurisdiction over contracts has been deemed conceptual, dependent entirely upon the connection of the transaction with either maritime commerce or navigation,7 while the primary—and for some time sole—criterion for determining whether or not a tort is within the scope of the admiralty jurisdiction is simply whether the occurrence involved took place upon navigable waters.8 As early stated

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4. The barriers to a complete application of the admiralty jurisdiction that have already been judicially removed are (1) the interpretation of the constitutional grant, which some argued was limited by matters deemed maritime in England at the time our Constitution was drafted, (2) the belief that the jurisdiction of the admiralty was limited to occurrences involving commerce and navigation upon waters within the ebb and flow of the tide, and (3) the belief that the admiralty jurisdiction was restricted by the commerce clause. For the disposition of these matters, see 7A J. Moore, Federal Practice ¶ 200, at 2011-2092 (2d ed. 1966).

5. U.S. Const. art. III, § 2.

6. See 7A J. Moore, Federal Practice ¶ 200 [2], at 2031-2041 (2d ed. 1966) for a discussion of the meaning of the constitutional grant.


8. See the numerous cases cited in the succeeding portions of this article, and note that while many of these cases speak in terms of a "strict locality" rule for ascertaining whether or not a cause is maritime, even these courts have recognized that there must
by Justice Story, on circuit, in his treatise-like opinion in De Lovio v. Boit.9

On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality . . . . (Emphasis added).

There is much to commend the decisions of the early judges of this nation rejecting the strict locality test of admiralty jurisdiction as far as maritime contracts were concerned, notwithstanding that a series of Prohibitory Writs had, by the beginning of the Nineteenth century, stripped the English admiralty of its jurisdiction over all but those contracts executed and to be performed upon the high seas.10 For, clearly, "These cases [in admiralty] are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."11 Thus, the courts of the then newly founded United States properly concluded that the cases of "admiralty and maritime Jurisdiction" to which the Constitution referred obviously was, at least in the case of contracts, to be determined by historical precedents long antedating the English prohibitive writs and should not be limited by physical boundaries.12

Notwithstanding the early presence of such clear and rational think-

today be exceptions to so inflexible a rule. The exceptions—both judicially and statutorily created—are discussed in detail, commencing in the text at note 87, infra.

It should also be noted, that in attempting to determine exactly what constitutes a tort for maritime jurisdictional purposes, the courts have generally made "tort" synonymous with "injury," and looked to the place where the impact causing the injury occurred, rather than to the place where the negligent act occurred. See generally The Plymouth, 70 U.S. (3 Wall.) 20 (1865), which has been somewhat modified by the Extension of Admiralty Jurisdiction Act, discussed in the text commencing at note 108, infra. See also Black, Admiralty Jurisdiction: Critique and Suggestions, 50 COLUM. L. REV. 259, 264 (1950) criticizing both the traditional tests of admiralty tort jurisdiction and the conclusion that a tort, which is a "mental construction, [and] doesn't 'take place' anywhere," occurs at the point of injury.

9. 7 F. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815).

10. Originally, the jurisdiction of the admiralty in England was much broader than it had been in other maritime nations, owing in large measure to the benefit to the crown of having as many causes as possible determined by an Admiral appointed by it and not obstructed by the presence of Jurors. Pressure from jealous Courts of Common Pleas eventually resulted, however, in the enactment of a series of prohibitory writs stripping the admiralty of much of its power, including matters generally deemed maritime elsewhere. For a more thorough discussion of the English Admiralty during this period of restriction, see DeLovio v. Boit, note 9, supra; and 2 T. Parsons, A Treatise on the Law of Shipping 174-75 (1869).


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ing on the benches of our nation when maritime contract considerations were involved, the English influence proved more pervasive in the field of maritime torts. Here, apparently oblivious to the fact that historically subject matter and not location was also predominant in delineating maritime torts,\(^\text{13}\) the restrictive English rule was allowed to prevail. However, although the number and strength of the precedents for this anomalous proposition grew with each passing decade, there has always been present a nagging doubt—if not an expression of outright dissent—of the justness and rationality of this judicially created distinction between maritime contract and tort jurisdiction not present in any of the sea codes from which our maritime law emanates.

**DEVELOPMENT AND PRESENT STATUS OF THE STRICT LOCALITY RULE**

The dicta of Justice Story in *DeLovio* was widely cited, and there was soon no dearth of decisions holding that in determining the admiralty jurisdiction over torts, the situs of the occurrence is the sole relevant criterion. Illustrative of this are *The Philadelphia, Wilmington and Baltimore Railroad Company v. The Philadelphia and Harve De Grace Steam Towboat Company\(^\text{14}\)* where the Court stated:

> The jurisdiction of the courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court;\(^\text{15}\)

and *The Plymouth,\(^\text{16}\)* decided after the admiralty jurisdiction had been

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\(^{13}\) See the Appendix to 30 F. Cas. at 1169-1216, setting forth the Laws of Oleron, Laws of Wisbuy, Laws of the Hanse Towns and Marine Ordinances of Louis XIV. In none of these ancient codes is a "strict locality" test evident.

Even in England which, until the twentieth century, continued to apply laws restricting the admiralty jurisdiction, mere locality was not deemed sufficient to bring a cause within the admiralty. See, *inter alia*, the discussion by Lord Esher in *The Queen v. Judge of City of London Court*, 1 Q.B. 273, 294 (1894), wherein he states:

> I come, then, to inquire what the English law is. On what does the jurisdiction of the Admiralty Court depend? It does not depend merely on the fact that something has taken place on the high seas. That it happened there is, no doubt, irrespectively of statute, a necessary condition for the jurisdiction of the Admiralty Court; but there is the further question, what is the subject-matter of that which has happened on the high seas? *It is not everything which takes place on the high seas which is within the jurisdiction of the Admiralty Court.* (Emphasis added).

\(^{14}\) 64 U.S. (23 How.) 209 (1859).

\(^{15}\) *Id.* at 215.

\(^{16}\) 70 U.S. (3 Wall.) 20 (1865).
extended to all navigable waters of the United States and not limited only to those waters within the ebb and flow of the tides,\textsuperscript{17} where the Court stated:

In the case of Thomas v. Lane, Mr. Justice Story, in a case where the imprisonment was stated in the libel to be on shore, observed: 'In regards to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within the ebb and flow of the tide.' Since the case of the Genesee Chief, navigable waters may be substituted for tide waters. This view of jurisdiction over maritime torts has not been denied.\textsuperscript{18}

The Court, in \textit{The Plymouth}, also added by way of dicta that "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters."\textsuperscript{19} This not only confirmed the by then oft-stated importance of the situs of the occurrence, but weakened, if it did not entirely destroy, the efficacy of future arguments that while the formative decisions seemingly established location as the sole relevant criterion of admiralty tort jurisdiction, in actuality all such cases did involve transactions which were of a truly maritime nature.\textsuperscript{20} Clearly, the Court's disassociation of the jurisdiction from a necessary connection with a vessel—that traditional object of the admiralty jurisdiction—is strong evidence indeed that at least one early court did consider the matter and concluded that a tort need not have a maritime flavor to be within the jurisdiction of the admiralty, but need simply to have caused an injury to a person or object situate upon navigable waters.

One final early decision that should be of particular interest to the literati is \textit{The Highland Light},\textsuperscript{21} where Justice Chase, on circuit, waxed poetic in stressing the importance of location in ascertaining the jurisdiction of the admiralty over torts, stating:

\begin{quote}
Indeed, the jurisdiction for marine torts in admiralty may be said to be co-extensive with the subject. It depends on the locality
\end{quote}

\textsuperscript{17} For a comprehensive discussion of waters within the admiralty jurisdiction, including the extension of that jurisdiction to the inland waterways of the United States, see 7A J. Moore, \textit{Federal Practice} ¶ 200 [3], at 2071-2078 (2d ed. 1966).
\textsuperscript{18} 70 U.S. (3 Wall.) at 33-34.
\textsuperscript{19} \textit{Id.} at 35.
\textsuperscript{20} See the discussion of Campbell v. H. Hackfeld & Co., note 25, \textit{infra}.
\textsuperscript{21} 12 F. Cas. 198 (No. 6477) (D. Md. 1867).
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of the wrong, not upon its extent, character or the relations of
the persons injured . . .

The admiralty may be styled, not improperly, the humane provi-
dence which watches over the rights and interests of those 'who
go down to the sea in ships, and do their business on the great
waters.'

Notwithstanding the strong language of the foregoing cases and of a
plethora of similar decisions that have followed down to the present
date, serious doubts as to the advisability of a jurisdictional rule based
entirely upon the situs of the injury arose and persisted. One of the
earliest expressions of skepticism of the strict locality rule was voiced
by Judge Benedict, who stated in the first edition of his Treatise:

Cases of torts on the high seas, super altum mare, have always
been held, even in England, to be within the jurisdiction of the
Amiralty. And the jurisdiction in such cases has usually been held
to depend upon locality, embracing only civil torts and injuries
done on sea, or on waters of the sea, where the tide ebbs and flows.
It depends upon the place where the cause of action arises, and that
place must be the sea or tide waters. In this country, under the
influence of English authority, the same language has been held.

It may, however, be doubted whether the civil jurisdiction, in
cases of torts, does not depend upon the relation of the parties to

22. Id. at 138-139.

23. For more recent assertions (usually by way of dicta) of the principle that locality
alone, and not the maritime nature of the tort, is the controlling criterion for ascertaining
maritime jurisdiction, see: State Industrial Commission of the State of New York v.
Nordenholt Corporation, 259 U.S. 263 (1922) ("In torts the rule is different. There, juris-
diction depends solely upon the place where the tort was committed, which must have been
upon the high seas or other navigable waters."); Grant Smith-Porter Ship Co. v. Rhode,
257 U.S. 469 (1922) ("The 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.") Grant
Smith-Porter is particularly interesting because there the Court concluded that a tort
committed upon an incomplete vessel still under construction, but situate upon navigable
waters, was within the admiralty jurisdiction. Since such structures are not deemed within
the admiralty for contract purposes, the Court appears clearly to have felt bound by a
"strict locality" rule; and The Admiral Peoples, 295 U.S. 649 (1935).

See also, Wiper v. Great Lakes Engineering Works, 340 F.2d 727 (6th Cir. 1965),
cert. denied, 382 U.S. 812 (1965); Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.
1963), cert. denied, 375 U.S. 940 (1963); Pure Oil Co. v. Snipes, 293 F.2d 60 (5th Cir.
1961); Berwind-White Coal Mining Co. v. City of New York, 135 F.2d 443 (2d Cir.
adhering to the general rule, recognized exceptions where employment created a maritime
status, stating, "It is axiomatic that in the absence of a maritime status between the
parties in a personal injury action, the traditional test of locality of the tort governs the
question."); Puget Sound Bridge & Dry Dock Co. v. O'Leary, 290 F. Supp. 260 (W.D.
Wash. 1966); Horton v. J & J Aircraft, Inc., 257 F. Supp. 120, 121 (S.D. Fla. 1966) ("In
addition it should be noted that the Supreme Court has held that in tort, admiralty
jurisdiction depends entirely on locality."); Montgomery v. The Goodyear Tire & Rubber
Co., 231 F. Supp. 447, 454 (S.D.N.Y. 1964), aff'd 392 F.2d 777 (2d Cir. 1968) (Where, in a
case involving the crash of a naval dirigible in navigable waters, the court held "The sole
a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which the Admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen bathing in the sea, should assault, or imprison, or rob another, it has not been held here that the Admiralty would have jurisdiction of the action for the tort.24 (Emphasis added).

The first judicial expression of what has come to be known as Judge Benedict’s “famous doubt” appeared in Campbell v. H. Hackfeld & Co.,25 an action by an employee against a contracting stevedore to recover damages for injuries sustained on navigable waters while unloading cargo. In concluding that the employee’s cause of action was

24. E. BENEDICT, THE AMERICAN ADMIRALTY 173 (1850). This illustration, together with the doubt expressed therein, has been retained in all five succeeding editions of this treatise.

25. 125 F. 696 (9th Cir. 1903). The lower court’s opinion rejecting the strict locality rule of admiralty jurisdiction, which was affirmed by the Circuit Court of Appeals, was apparently unreported. There is, however, a student comment on the district court’s decision in 16 HARV. L. REV. 210 (1902) in which the case is both summarized and criticized. The basis of the criticism was, apparently, that:

Not only would the adoption of its doctrine [that of the principal case] unsettle a rule which has long been assumed to be law, but it would make the question of jurisdiction over torts subject to the difficulty which so often perplexes cases of contract, namely, the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems therefore unfortunate as increasing complication and uncertainty in the law without, apparently, securing any practical gain to compensate for these disadvantages.

While it may be true that a test dependent only upon geographical situs is more easily applied than one dependent upon conceptual standards, the purpose of the law is not to strive for ease in application but, instead, for just and rational results. Thus, it is believed that the criticism made in the above-cited review is not valid and—regardless of the ultimate soundness of the decision in Campbell v. H. Hackfeld & Co.—was properly rejected by the court of appeals. See also Gowdy v. United States, 271 F. Supp. 733, 737 (W.D. Mich. 1967) wherein it is stated that “Although the ‘locality’ rule is simply stated, its application is rather difficult, as is evidenced by the number of cases which have dealt with it.” This statement would seem to refute the only apparent reason for retention of the “strict locality” rule advanced by even its most ardent supporters.

It should be noted that while the question of whether the admiralty jurisdiction over torts is dependent solely upon the situs of the injury remains open, the decision in Campbell that an action by a stevedore for injuries sustained in the course of his employment is not of a maritime nature has long ceased to be valid law.
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not within the admiralty jurisdiction, Judge Ross, speaking for the Ninth Circuit, noted:

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, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs, and concluded:

In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction. These views are not in conflict with any decision brought to our notice, or that we have been able to find. They are not only, in our opinion, based on sound reason, but also find support in Benedict's Admiralty . . . .

The court in Campbell v. H. Hackfeld & Co. reached its decision notwithstanding that the holding of the lower court which it affirmed had been soundly criticized in a note in the Harvard Law Review and that in "many of the decisions of the Supreme Court, as well as of the Circuit Court of Appeals and of the Circuit and District Courts, the broad statement is made that in cases of tort the sole test of jurisdiction is locality . . . ." However, after looking to each of the prior and seemingly contradictory decisions, the court concluded that notwithstanding the broadness of the language that had been used in asserting that the location of the tort was the sole relevant jurisdictional criterion, the facts of each case clearly indicated that in all instances the tort involved was in fact of a maritime nature. And, in fairness to the court, such was clearly the case.

Whether rightly or wrongly decided, however, Campbell had no im-

26. Id. at 697.
27. Id. at 700.
28. See the discussion in note 25, supra.
29. 125 F. at 697.
30. The court did neglect to note, however, that there was strong contradictory dicta of the Supreme Court in The Plymouth, discussed at note 19, supra.
mediate impact on the by then well established locality concept of admiralty tort jurisdiction. This is evidenced both by the fact that some eight years passed before any reported judicial comment on this decision—which had, at least patently, so radically departed from the established concept—appeared, and by the fact that even then it was given little more than polite recognition. The decision referred to is *Imbrovek v. Hamburg-American Steam Packet Co.*,31 decided by the District Court for the District of Maryland in 1911, and affirmed per curiam by the Fourth Circuit in the following year. *Imbrovek* concerned an action by a stevedore to recover damages for injuries sustained while working in the hold of a vessel. An objection was made to the admiralty jurisdiction based upon the contention that, although the injury occurred upon navigable waters, it was not otherwise of a maritime nature. The district court recognized the existence of *Campbell*, which it properly determined was not binding upon it, and noted that in a case similar to the one before it decided in the District of Maryland some four years before *Campbell* "That eminent admiralty lawyer, Judge Morris..."32 had no difficulty in overruling similar objections to the admiralty jurisdiction. In fact:

In view of the language of the Supreme Court and of the inferior admiralty courts and of the expressions of the text-writers, he [Judge Morris] appears to have thought the jurisdiction too clear for dispute.33

The court then circumvented the serious questions presented by Judge Benedict and *Campbell* by concluding:

It may perhaps be that a tort committed on navigable waters, but not on a ship and not connected with a ship, or in any direct way affecting a ship, may not be redressed in the admiralty. Such, however, is not the case at bar.

The tort complained of occurred on navigable waters and on board of a ship. The parties to it were engaged at the time in work absolutely essential to the business of the ship in navigating the seas... It would seem that such a tort is clearly maritime. If maritime, it is in any event and under any general theory of jurisdiction within the cognizance of a court of admiralty.

If the Supreme Court and many other American courts and text-writers have been in error in saying that admiralty has jurisdiction

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31. 190 F. 229 (D. Md. 1911), aff’d, Atlantic Transport Co. of West Virginia v. Imbrovek, 193 F. 1019 (4th Cir. 1912), aff’d, 234 U.S. 52 (1914).
32. 190 F. at 233.
33. Id.
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over torts of whatever nature when committed on navigable waters, as the Circuit Court of Appeals for the Ninth Circuit thinks, it does not follow that admiralty has not jurisdiction over the case at bar.34

The Supreme Court affirmed this decision and the per curiam decision of the Court of Appeals in Atlantic Transport Company of West Virginia v. Imbrovek,35 stating:

We do not find it necessary to enter upon this broad inquiry that something more than a maritime location is necessary to confer admiralty jurisdiction. . . . And we are not now concerned with the extreme cases which are hypothetically presented. [Judge Benedict’s “famous doubt.”] Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still 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. . . .

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.36

Thus, while the decisions of both the lower court and the Supreme Court recognized the existence of Campbell and did not flatly say that the court deciding Campbell was clearly in error, neither opinion can be cited as authority in support of a “locality plus” concept of the admiralty tort jurisdiction. In fact, a thorough reading of the Imbrovek opinions leads to the almost inescapable conclusion that, if forced to decide a matter just slightly more plausible than Judge Benedict’s “famous doubt,” both the district and Supreme courts would have re-

34. Id. at 236-237.
35. 234 U.S. 52 (1914).
36. 234 U.S. at 61-62.

The Court, while not deeming it necessary to decide whether more than locality alone is necessary to invoke the admiralty jurisdiction, did note that:

The petitioner contends that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow. 234 U.S. at 61 (emphasis added).

To conclude that the maritime jurisdiction is dependent upon the actual involvement of a vessel in the occurrence of the injury transcends any historical requirement of the admiralty and would substitute one inflexible, irrational rule for another—i.e., it would substitute the necessary involvement of a vessel for the necessary occurrence of the injury upon navigable waters. Consequently, the rejection of this restrictive contention by the Supreme Court in Imbrovek was entirely proper. See also London Guarantee & Accident Co. v. Industrial Accident Commission of California, 279 U.S. 109, 123-24 (1929).
jected the *Campbell* reasoning completely. Nonetheless, and despite its tone, *Imbrovek*, while not capable of being used as authority favoring the contention that maritime tort jurisdiction must be based on something other than or in addition to geographical location, did not completely close the door on such contentions. And, this is particularly important because it marks the last time the Supreme Court trod this ground and illustrates that, notwithstanding its seeming disagreement with *Campbell*, it was at least unwilling to completely refute the contention that the true test of maritime tort jurisdiction is something other than the often fortuitous and meaningless factor of where the injury occurred. Thus, notwithstanding *Imbrovek*, other courts are still free to tread the *Campbell* path, although they have generally been reluctant to do so.

Quite understandably, the overwhelming majority of post-*Imbrovek* decisions, obviously influenced thereby, have concluded that, in the absence of specialized circumstances which will be hereinafter discussed, the situs of the wrong alone is determinative of the admiralty tort jurisdiction. A few jurists, while not ready to follow *Campbell*, did recognize that the *Imbrovek* Court left the question of whether the jurisdictional requirement was locality "plus" open, and took the precaution of concluding that, regardless of the test used, the cases before them obviously were of a maritime nature. Illustrative of this more cautious line of decisions are *The Raithmoor*; *The Poznan*; *Sidney Blumenthal & Co. v. United States*; and *Kermarec v. Compagnie Generale Transatlantique*.

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37. See the discussion of extensions of the strict locality rule in areas concerning, *inter alia*, seamen, infra, at pp. 23-36 of text.
38. See cases cited in note 23, *supra*.
39. 241 U.S. 166, 176 (1916). "We regard the location and purpose of the structure as controlling. ... It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—at least in all cases where the wrong was of a maritime character."
40. 276 F. 418, 433 (S.D. N.Y. 1921) (Where the ever cautious Judge Learned Hand stated: Was it, then, a maritime tort over which the admiralty will take jurisdiction? Confessedly, that question depends rather on historical than a priori considerations. Ordinarily it is the locus of the tort which governs, and where the injury is on the water though the defendant's act was on the land, that locus is determined by the water. ... Perhaps, not every tort committed at sea is within the jurisdiction of an admiralty court. ... At least for the purposes of this case I may assume that the injury must be maritime in its character as much as though the case sounded in contract.)
41. 30 F.2d 247, 249 (2d Cir. 1929) (Where Judge Learned Hand, now on the Court of Appeals, stated that *Imbrovek* is authority for the proposition that the occurrence of an injury upon navigable waters is prima facie the test of admiralty jurisdiction, though admitting that "It is true that in that case the question was left open whether there might not be torts committed on the water of which the admiralty would not take cognizance.")
42. 245 F.2d 175, 180 (2d Cir. 1957), rev'd on other grounds, 358 U.S. 625 (1959).
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Yet a third group of jurists, undaunted by the strong dicta in Imbrovek and subsequent Supreme Court decisions leading to the clear inference that locality alone was the criterion for designating a tort maritime, have both in dicta and in holding stated their dissatisfaction with the majority view. It is these decisions—which appear to be growing more numerous—that offer the best hope of escaping the illogical distinctions created by the early reluctance to completely scrap the prohibitive restrictions placed upon the English admiralty by jealous courts of law, notwithstanding these restrictions were so at odds with the general maritime law of nations then in effect throughout the rest of the seafaring world.44

It would have surprised the author of one of these early "third group" decisions to be informed that he was in any way radically departing from the majority view. In McDonald v. City of New York Judge Learned Hand—usually distinguished for the caution he exercised in the area of ascertaining the limits and basis of maritime tort jurisdiction—was confronted with a situation wherein an employee on a lighter moored on the Harlem River was injured by a cinder wafted into the air as it was being dumped into City owned scows for carriage to an ultimate dumping ground. In the course of deciding the matter, Judge Hand felt compelled to declare:

We must hold that this case is governed by the maritime law, the injury taking place in navigable waters . . . Theoretically it may be necessary, therefore, for us to form our own judgment, independently of what the New York courts have said.47

In actuality, however, Judge Hand did not look to the maritime substantive law—as indeed he would have been compelled to if the matter really was maritime—but looked, instead, to the law of New York because the interests of shipping were not " . . . so paramount to those of the city as to compel a different compromise from what has seemed

43. See those decisions of the Supreme Court cited in note 23, supra.
44. See note 13, supra.
45. 36 F.2d 714 (2d Cir. 1929).
46. See notes 40 and 41, supra.
47. 36 F.2d at 715-716.
48. See inter alia, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) which makes it clear that if a cause of action is maritime, the general maritime law and not state law should be applied, regardless of the forum. See also G. Gilmore and C. Black, The Law of Admiralty 45-46, 374 et seq. (1957).
just to the state tribunals.” Rather than construing *McDonald* as a “locality plus” case, an argument can be made that it is merely an example of the then very much in vogue “maritime but local” concept spawned by the Supreme Court’s decision in *Southern Pacific v. Jen-son.* However, application of the New York law in *McDonald* caused the court to dismiss the libel of the seriously injured libellant who, for all the case informs us, could perhaps have had some recovery under the maritime law. And, while it is clear that local interests can sometimes compel the application of local terrestrial law to *increase* the rights of a claimant whose cause of action is maritime, they can never be used to detract from or destroy those federally created rights. Thus, unless it is conceded that the true basis of *McDonald* was that the cause, though dealing with an injury incurred upon navigable waters, was not maritime in nature and, therefore, not within the jurisdiction of the admiralty, the decision seems unsupportable.

A second decision somewhat more clearly, though still not expressly, departing from the majority of decisions spawned by *Imbrovek* is *LeMaster v. Chandler.* This case involved a claim by the owner of a truck against the operators of a ferry for damages sustained when the truck rolled off the ferry and into the Columbia River. The majority of the court obviously treated the case as non-maritime, notwithstanding the injury occurred upon navigable waters. Although the court made no comment upon this point in the opinion, it is apparent that the maritime or non-maritime question was brought to its attention since one Justice, dissenting, stated:

I dissent because of the court’s failure to heed the admonition of the United States Supreme Court . . . that the common law cannot be applied to a maritime tort.

49. 36 F.2d at 716.
50. 244 U.S. 205 (1917). See also, D. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 S. CT. REV. 158, 178 where it is stated: “‘Maritime-but-local’ was for twenty years after *Jen-son* a flourishing basis for decision!”
51. See Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953) (“While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.”)
52. 309 P.2d 384 (Wash. 1957).
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The accident in question occurred aboard a vessel navigating the Columbia river, a navigable water of the United States. Article III, § 2 of the Federal Constitution extends the judicial power of the United States 'to all Cases of admiralty and maritime Jurisdiction' and but for the saving clause, jurisdiction in this case would be exclusively in the United States district court. . .

The third decision in this group of cases apparently undaunted by Imbrokev's tone is McGuire v. City of New York—and, here, there is no need to reach this conclusion by innuendo or implication. In McGuire the plaintiff was injured when she swam into a submerged object protruding from the bottom of a public bathing beach. Alleging that the cause was properly within the jurisdiction of the admiralty because the injury occurred in or upon navigable waters—in this case the Atlantic Ocean—plaintiff proceeded on the admiralty side of the District Court for the Southern District of New York. In dismissing the libel as not being within its jurisdiction, the court stated:

While it has been urged that admiralty has jurisdiction over all torts where the wrong takes place on the high seas or other public navigable waters of the United States, this position has not been adopted either by the text writers or by the courts. The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. A maritime wrong generally has been concluded to be one which in some way is involved with shipping or commerce.

After correctly stating that the locality test as developed in England was a rule of limitation or exclusion and not a rule designed to bring a wide variety of non-maritime transactions within the admiralty jurisdiction merely because of fortuitous circumstances, the court concluded:

The libel in this case does not relate to any tort which grows out of navigation. It alleges an ordinary tort, no different in substance because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line. Whether the City of New York should be held liable for the injury suffered by libellant is a question which can easily be determined in the courts of the locality. To endeavor to project such an action into the federal courts on the ground of admiralty jurisdiction is to misinterpret the nature of admiralty jurisdiction.

53. Id. at 387-88.
55. Id. at 868-69.
56. Id. at 871-72.
Notwithstanding that McGuire has given new and vigorous support to the complaints of generations of legal scholars mystified by the anomalous adherence of our courts to a strict locality test, it has far from ended the controversy. A few courts, apparently anxious to break out of the dilemma long ago created by the establishment of differing jurisdictional tests for maritime torts and contracts, have enthusiastically embraced the McGuire reasoning. The first of these was the District Court for the Eastern District of Pennsylvania in Weinstein v. Eastern Airlines, Inc., where it was stated, in the course of holding that neither the tort nor warranty portions of an action based on the crash of an airplane into the navigable territorial waters of a state was within the admiralty jurisdiction: “The better rule would seem to be that, in the absence of statute, a maritime locality plus some maritime connection is necessary for admiralty [tort] jurisdiction.” (Emphasis added).

This resort to near reason was short-lived, however, as the Court of Appeals for the Third Circuit reversed that portion of Weinstein dealing with tort claims, concluding some thirteen months later that they

The development of the American rule making admiralty tort jurisdiction dependent upon the situs of the occurrence was, initially, contemporaneous with and apparently influenced by the era of the restrictive prohibiting writs stripping the British admiralty of much of its former jurisdiction. See note 10, supra. Thus, it does indeed seem anomalous today to use this restrictive test to include obviously non-maritime matters within the scope of the admiralty jurisdiction. Conversely, to exclude matters obviously maritime in nature from the scope of the admiralty jurisdiction because of such a fortuitous circumstance as the place of the occurrence, is to give credence and support to a concept created by jealous courts of common pleas centuries ago, and since rejected by the very nation establishing it!

57. See, inter alia, Black, Admiralty Jurisdiction: Critique and Suggestions, 50 COLUM. L. REV. 259 (1950); Comment, Admiralty Jurisdiction: Airplanes and Wrongful Death in Territorial Waters, 64 COLUM. L. REV. 1085 (1964); and the judicial decisions commencing with Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903), discussed at note 25, supra, and culminating with McGuire v. City of New York, 192 F. Supp. 866 (S.D.N.Y. 1961), discussed at note 54, supra. See also, Judge Kunzel's opinion in Fematt v. City of Los Angeles, 196 F. Supp. 89, 91 (S.D. Cal. 1961) which makes a strong argument for the proposition that the “strict locality” concept of admiralty tort jurisdiction has no basis in the general maritime law, and cites many “legal writers” who urged... that the ‘locality’ test of jurisdiction be swept aside by Congressional action.”


59. Id. at 433.

The court did note, however, that Congress by statute could extend the admiralty jurisdiction to airplanes, and cited the Death on the High Seas Act, 46 U.S.C. § 761, as an illustration of a situation where this was in fact done. The court did not feel that such statute was applicable to the cause before it, however, since the crash did not occur on the high seas but, instead, upon the territorial waters of the United States. That Congress does not have the power to extend the jurisdiction of the admiralty to matters not of a maritime nature is made clear by Panama Railroad Co. v. Johnson, 264 U.S. 375.
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were cognizable in the admiralty. In reaching this decision, the Third Circuit decided that Imbrovek had settled this issue—which conclusion many other courts had by that time refused to reach—stating:

McGuire to the contrary notwithstanding, the weight of authority is clearly to the effect that locality alone determines whether or not a tort claim is within the admiralty jurisdiction. In Atlantic Transport Co. v. Imbrovek . . . the Supreme Court expressly rejected the contention that the tort must, in addition to meeting the locality test, have some connection with a vessel.

The Weinstein court then noted that the "strict locality" view of admiralty tort jurisdiction had prevailed despite "recurring expressions of doubt" and, attempting to cover all bases, made the further point that, even if the "locality plus" doctrine be deemed applicable, the crash of an airplane into the sea should be within the admiralty jurisdiction because:

At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce on or across these same waters. 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 . . .

Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. (1924), and Detroit Trust Co. v. The Thomas Barlum, 298 U.S. 21 (1934), both of which hold that while the Congress may amend and revise the maritime law to keep pace with changing conditions and scientific advances, it must act "... within a sphere restricted by the concept of the admiralty and maritime jurisdiction . . ." in so doing. Thus, notwithstanding many courts have applied the Death on the High Seas Act to actions arising out of airplane crashes upon the high seas, if such matters do not deal with maritime commerce and navigation—as indeed, it is evident they do not—it would seem that such cases illustrate unwarranted and unnecessary extensions of the admiralty jurisdiction. See Moore and Pelay, Admiralty Jurisdiction—The Sky's The Limit, 33 J. Air L. & Com. 3 (1967); and 7A J. Moore, Federal Practice ¶ 200 [2] at pp. 2038-41 (2d ed. 1966).

61. 234 U.S. 52 (1914).
62. See notes 39-42, supra.
63. 316 F.2d at 763. While the Supreme Court in Imbrovek did in fact conclude that a tort, to be maritime, need not involve a vessel, it left open the much more important and relevant question of whether it must be related to maritime commerce or, at least, maritime navigation. See text at note 36, supra.
64. Id. at 763.
Either to assuage the feelings of the lower court and of the judge who decided *McGuire* or, as is far more likely, because the *Weinstein* court was also somewhat taken aback by the bizarre results that could occur from a complete and unwavering dedication to the strict locality test, the court added in a footnote:

The result reached in McGuire . . . may well be compatible with the "locality alone" test. To say that a person bathing in the shallow, and probably unnavigable in fact, waters of a public beach is within the locus of admiralty jurisdiction would be to distort the meaning of the locality test beyond what reason and policy would suggest or require.65

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65. *Id.* at 763, n.13.

That *Weinstein*, insofar as it affirms the strict locality test of the admiralty tort jurisdiction, is still valid law in the Third Circuit has been recently illustrated in the opinion on rehearing of *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3rd Cir. 1968), filed June 28, 1968. That decision is particularly interesting in that the majority of a sharply divided court applied Pennsylvania wrongful death and survival law to a claim brought by a citizen of Pennsylvania against a Delaware corporation for a death caused by an airplane crash into the navigable territorial waters of Massachusetts. The court reached this conclusion (1) because the action was characterized as being in assumpsit—i.e., one for the negligent breach of a contract of carriage; and (2) because it believed that even if the cause was construed as a maritime tort, the maritime law adopts the wrongful death law of the state which has the greatest number of contacts with the occurrence, and not necessarily in all instances the law of the state into whose territorial waters the aircraft crashed.

While the *Scott* case thus turned primarily upon the characterization of the cause of action as being contractual rather than tortious and did in fact take pains to affirm the *Weinstein* position regarding the strict locality rule, it is full of language that can just as easily be construed in a proper context as opting for a conceptual or functional approach. This is especially true in that portion of the majority opinion where the court illustrates that even using the maritime conflicts of law approach would justify its decision to apply Pennsylvania death law rather than the law of Massachusetts. See, for instance, pages 19-21 of the official text of the opinion where the court stated:

Our reliance upon Lauritzen and Romero is fortified by the realization that these two cases were in the vanguard of many recent enlightened decisions attacking the usefulness and justice of rigid adherence to the strict *lex loci delicti* rule. Equally as important in this regard is that an analysis of Eastern's position here reveals that it is essentially championing a vested rights approach to maritime wrongful death and survival actions. Historically, this approach, as embodied in the rule of *lex loci delicti* dictated that the law of the place of the tort would invariably govern because it was believed that the right to recover for a foreign tort was created or withheld by the law of the jurisdiction where the injury occurred. *Application of this concept permitted of simplicity, uniformity, and predictability, but too often failed to take cognizance of legitimate interests of other states*. . . .

Admiralty courts, like state courts, have an obligation to refrain from applying a rule when its application would be "inappropriate or inequitable." We strongly believe that it would be most inappropriate, if not inequitable, to apply the law of Massachusetts to this case simply because Eastern's aircraft happened to crash into that state's navigable waters. (Emphasis added).

Many of the arguments made by the majority in *Scott* would seem equally applicable to a rigid adherence to the strict locality rule of maritime tort jurisdiction in non-death cases. And, the dissent, authored by Chief Judge Hastie and concurred in by two other judges, seems to have recognized this point. Thus, while the Third Circuit is still a strict locality jurisdiction, it remains to be seen whether the more enlightened approach taken by the majority in *Scott* will ultimately be used to weaken the foundations of *Weinstein*. For, indeed, if admiralty courts do have an obligation to refrain from applying a rule
Supposedly, this means that while the Weinstein court might not alter the McGuire decision, it would first dip a Fathometer into the water at the place of impact to determine whether vessels could in fact navigate at that point. Whether the vessels the court had in mind were in the nature of row-boats or skiffs or more akin to large freighters or ocean-going liners was, perhaps mercifully, not intimated.

One later pro-McGuire decision which has not had the misfortune of being overruled is particularly worthy of comment, especially since it—like the final Weinstein decision—was rendered by a Court of Appeals and is therefore binding precedent for all district courts in that circuit. This decision is Chapman v. City of Grosse Pointe Farms,\(^6\) decided by the Court of Appeals for the Sixth Circuit in 1967. The action was brought within the maritime jurisdiction to recover for injuries occasioned when libellant struck bottom diving from the side of a pier into very shallow waters of Lake St. Clair. The alleged negligence was the City’s failure to erect barriers along the pier and to adequately warn prospective divers of the shallowness of the water adjacent to the pier. In affirming the decision of the District Court that the cause was not properly within the admiralty jurisdiction, the Court of Appeals noted that a review of prior case law led to an observation that “[s]ome relationship between the alleged wrong and maritime service, navigation or commerce on navigable waters, is a condition sub silentio to admiralty jurisdiction...\(^6\) (Emphasis added); and concluded that:

While the locality alone test should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water, it is here determined 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. Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts.\(^6\)

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\(^6\) when its application would be “inappropriate or inequitable,” it would seem that they can no longer sanction decisions like Weinstein.

66. 385 F.2d 962 (6th Cir. 1967).
67. Id. at 966.
68. Id.

It is also interesting to note that the court thought its decision reconcilable with the circuit court’s opinion in Weinstein because of the latter’s footnote quoted herein in the text at note 65, supra. The court stated at 966 that “In making this concession, [the above
One other case which, though nowhere near so emphatic in its rejection of the strict locality test of admiralty jurisdiction as *McGuire* or *Chapman*, may be construed as in accord with those decisions, is *Hastings v. Mann*. This case involved an action against the owner of a boat ramp for injuries occasioned while the libellant was standing below the water line of a sloping ramp attempting to launch a small boat. The court noted that "The locality test is well entrenched in the law today . . . ," and that the injury occurred on an extension of the land—which, under the existing status of the strict locality rule would have been sufficient to conclude that the admiralty did not have jurisdiction of the cause. Not content to stop at that point, however, the court began quoting extensively from *McGuire*, and concluded:

This libel has no relation to a tort which arises out of navigation. It alleges an ordinary tort, just as if libellant had fallen on that part of the ramp above the water line. Thus, this action is not cognizable in admiralty and is without the maritime jurisdiction.

This language, and the portions of *McGuire* quoted in the opinion, make it at least plausible to conclude that the District Court for the Eastern District of North Carolina in *Hastings v. Mann* followed the *McGuire* reasoning, and did much more than merely attempt to distinguish or reconcile it. In affirming this decision, the Court of Appeals for the Fourth Circuit obviously treated the launching ramp as an extension of the land and, consequently, the opinion cannot be used as an example of those cases following *McGuire*. However, the Court of Appeals did note:

The rights of the boat operator and the jurisdiction of Admiralty ought not to depend upon such empty distinctions as might be said to arise out of his immediate location on the launching ramp at the quoted footnote] it appears that Weinstein does in fact accept the 'locality plus' test, notwithstanding the declaration as to the propriety of the 'locality alone' criterion." It is submitted that a more logical inference to be drawn from the Weinstein footnote is that the Third Circuit was just exercising caution lest the matter ultimately reach the Supreme Court so that its decision then could be affirmed either upon the basis of "strict locality" or upon the basis that, in any event, the cause before it was—unlike *McGuire*—of a maritime nature. In short, it appears difficult to rationally reconcile the decisions of the Third and Sixth Circuits on the jurisdictional point.

72. 226 F. Supp. at 964.
73. *Id.* at 965.
74. See the decision of the Court of Appeals in *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965), cert. denied, 380 U.S. 963 (1965).
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time of the injury. Whether, at the time the injury was sustained, he was above or below the high water mark, whether he was landward or seaward of the actual edge of the water, his rights should be the same, and they should be determinable in the same court.75

The same argument would seem to apply whether the libellant was standing on a submerged portion of the ramp (which was here deemed an extension of the land) in attempting to launch his boat or standing alongside the ramp in the shallow waters of the sound while attempting to effectuate the same act. Consequently, it may well be that the Fourth Circuit would also follow the lead of McGuire and Chapman should a suitable occasion arise.

While McGuire,76 Chapman77 and, perhaps, Hastings v. Mann78 have given a new impetus to the movement dedicated to the overthrow of the "strict locality" rule of the admiralty jurisdiction, it should not be assumed that the Third Circuit alone is now preserving that bastion of illogic. McGuire, notwithstanding recent gains, still represents the minority view even if only all cases decided subsequent to it are considered. Illustrative of this is Horton v. J & J Aircraft, Inc.79 where the District Court for the Southern District of Florida stated:

The Court agrees with respondents that the instant case involves a maritime location but no maritime wrong. However, the Court questions the correctness of the test laid down in the McGuire case.80

75. Id. at 912. 
See also, Holland v. Harrison Brothers Dry Dock and Repair Yard, Inc., 306 F.2d 369, 373 (5th Cir. 1962) where, as dicta and in a footnote, the court stated: The Supreme Court has frequently confirmed the 'general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality.' . . . In point of fact, however, the courts consider both locality and nature whether the claim is based on fault or on statutory liability irrespective of fault. In Atlantic Transport Co. of West Virginia v. Imbrovek . . . the Court buttressed its conclusion that the negligence suit was within the admiralty jurisdiction by the observation that the nature of the claimant's duties was maritime; . . . Correspondingly, note the emphasis in Nordenholt, supra, that the Court attached to locality in deciding that the plaintiff was entitled to relief under the New York Compensation statute.
80. Id. at 121.

It is interesting to note that the court also stated "In addition it should be noted that the Supreme Court has held that in tort, admiralty jurisdiction depends entirely on locality. Atlantic Transport Co. of West Virginia v. Imbrovek. . . ." That Imbrovek did not so hold has been made clear by a host of decisions, including later decisions of the Supreme Court. See notes 39-42, supra, and accompanying text.
Also, in *King v. Testerman*, while admitting the matter was not free from doubt, the court permitted an injured water-skier to bring an action against the operator of the boat towing him because:

The concurrence of the use of a boat in connection with the accident and the fact that it occurred on navigable waters constrains the Court to the belief that admiralty jurisdiction is thereby established.

Reference is also made to *Wiper v. Great Lakes Engineering Works* where the Court of Appeals for the Sixth Circuit stated that the "... traditional test of locality of the tort governs the question of whether maritime or state law is applicable..."; *Gowdy v. United States*; and a plethora of recent decisions allowing causes of action arising out of airplane crashes into navigable waters to be brought within the admiralty and maritime jurisdiction of the district courts. Clearly, a maritime connection does not exist in matters involving airplane crashes and, consequently, they too must be treated as judicial sanctions of the strict locality test of the admiralty jurisdiction.

Thus, notwithstanding frequent criticism by both the treatise writers and, more recently, a growing minority of courts; the refusal of the Supreme Court to affirmatively and unequivocally endorse the "strict locality" test; and the lack of historical or other rational precedent, the principle that the situs of the occurrence alone is determinative of whether a cause is within or without the admiralty tort jurisdiction lives on. In fact, with the comparatively recent advent of greatly increased transoceanic air carriage, the number of causes now being treated as maritime torts which do not involve any connection with maritime commerce or navigation has greatly increased in the last

82. Id. at 336.
83. Id. at 336.
84. It is interesting to note that, not only did the court consider the matter as not being free from doubt and exercise the caution of tying in locality with the concurrence of the use of a boat, but it also noted that this conclusion was reached "pursuant to the joint opinion of counsel for the respective parties..." It can, therefore, be conjectured that if a vessel had not been involved and if counsel had argued that no jurisdiction existed, a different conclusion might have been reached. Nonetheless, *King v. Testerman* seems more capable of being used to support the anti-McGuire decisions than those embracing McGuire. It is not, however, a strong illustration of the former decisions.
85. 340 F.2d 727, 730 (6th Cir. 1965), cert. denied, 382 U.S. 812 (1965). Although this decision was not overruled by *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), that case would seem to make it clear that the Sixth Circuit no longer adheres to the "strict locality" rule of maritime tort jurisdiction.
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decade. This can be interpreted as meaning that—*McGuire* notwithstanding—the "strict locality" concept has grown even stronger and become more encompassing. In any event, while an increasing number of courts might hesitate to bring a present-day *McGuire* within the admiralty jurisdiction, many of those same courts would probably have no trouble whatsoever in permitting a long-distance swimmer ensnared in a negligently laid transatlantic cable in the middle of the English Channel to categorize his action in tort as maritime, notwithstanding the total absence of a relationship to navigation or maritime commerce.

Clearly, the question of whether "locality alone," "locality plus" a connection with navigation or commerce, or simply a connection with maritime commerce or navigation alone is the proper test to determine whether a tort is within the admiralty jurisdiction remains unsettled. And, this notwithstanding that modern technology—including the advent of the transoceanic air carriers and the establishment of permanently anchored drilling rigs far at sea—has given a new importance to the problem.

It can only be hoped that the confusion created by the Supreme Court's refusal to close the door completely on "locality plus" in *Imbrovek*, and compounded by the now clearly divergent views of at least two courts of appeals, will ultimately be settled—and, that this time the Supreme Court will expunge all semblance of the English prohibitive writs from our admiralty, and effect a long-needed and proper coalescence of the jurisdictional tests for maritime torts and contracts.

**Extensions of the Admiralty Tort Jurisdiction**

While history and logic strongly militate against the continued existence of the "strict locality" concept of admiralty tort jurisdiction, an even more damaging indictment is found in the number of times courts and the legislature have had to create exceptions to that doctrine in order to effectuate just results. 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. Thus, crashes of airplanes into

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86. See the discussion in the portions of this Article preceding this Sub-Section.
the high seas or falls of non-seamen from docks into navigable waters
gave rise to maritime causes of action while suits by seamen or other
personnel necessary to man and unload great ocean going vessels were
deemed beyond the scope of the admiralty if the injury—though ser-
vice connected—occurred on the dock rather than upon the vessel
itself, notwithstanding the latter were clearly engaged in maritime
commerce or navigation while the former were just as clearly unrelated
thereto. For this reason, exceptions to the strict locality test of the
admiralty tort jurisdiction were created, both by the courts and by the
legislature. Such exceptions must be looked upon as judicial and legis-
lative acknowledgment of the fact that the strict locality test—notwith-
standing its alleged ease of application\(^7\)—is not, at least in and of itself,
a valid criterion for determining maritime torts. Consequently, it is
helpful to examine the judicially and legislatively created exceptions
to see if they provide some clue to a more valid basis upon which a
jurisdictional test may be founded than does the often fortuitous and
irrelevant situs of the injury.

The first “exception” to the strict locality rule of admiralty juris-
diction may, in reality, not be an exception at all, but an inherent part
of the general maritime law adopted by Article III, Section 2 of the
Constitution. Reference is made, of course, to the remarkable maritime
doctrine of maintenance and cure—that humane innovation of the
ancient admiralty which, when coupled with present developments in
maritime personal injury law, enables seamen to both have their cake
and eat it too!\(^8\)

The doctrine of maintenance and cure benefits a seaman injured or
stricken with illness during a period of maritime employment, regard-
less of whether the illness or injury first manifested itself or “occurred”

\(^7\) That the strict locality test is not as easy to apply as often assumed is illustrated

\(^8\) Thanks to the doctrine of maintenance and cure, a seaman can often obtain
needed board, lodging and medical care while his action for pain, suffering and lost wages
is pending against his employer. In no other area of the law is this true. Employees
within the scope of a state workman’s compensation statute or the Longshoremen and
Harbor Workers’ Compensation Act are furnished with a compensation award but are
normally precluded from suing their employers; railroad workers, on the other hand, may
sue their employers but receive no interim compensation. Only the seaman has both
remedies available.
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upon land, rather than upon navigable waters. Thus, the liability of the vessel owner to furnish medical care and to maintain and feed the disabled seaman—a *maritime* liability clearly cognizable in the admiralty—is in no way limited by the strict locality rule of the admiralty tort jurisdiction, notwithstanding payments for maintenance and cure are in some instances part of the recovery due a seaman as compensation for a maritime tort.

That maintenance and cure can be treated as an exception to the strict locality rule of the admiralty jurisdiction is illustrated by the opinion of the Supreme Court in *O'Donnell v. Great Lakes Dredge & Dock Co.* There, in the course of concluding that a seaman injured on land while acting within the scope of his employment has a maritime cause of action under the Jones Act, the Court looked to the doctrine of maintenance and cure for an applicable analogy, noting:

> As we have said, the maritime law, as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. *But there is an important exception to this generalization in the case of maintenance and cure.* From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, whether occurring on sea or on land. It is so stated in Article VI of the Laws of Oleron . . . and in Article XVIII of the Laws of Wisbuy . . . And see Article XXXIX of the Laws of the Hanse Towns . . . Articles XI and XII of Title Fourth, Marine Ordinances of Louis XIV . . .

The Court, though obviously believing the analogy drawn apt, proceeded to hedge somewhat, perhaps because it felt uneasy about attempting to justify its extension of the admiralty tort jurisdiction inland upon an analogy to maintenance and cure, admitting:

> Some of the grounds for recovery of maintenance and cure would, in modern terminology, be classified as torts. But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship. . . . That status has from the beginning been peculiarly within the province of the maritime law . . .


90. 318 U.S. 36 (1943).

91. Id. at 41-42.

92. Id. at 42.
Thus, the ultimate decision in *O'Donnell* was not premised solely upon the eminently sound basis that, historically, as evidenced by the doctrine of maintenance and cure, the admiralty had not deemed itself bound by geographic restrictions where the rights of seamen and others of a clearly maritime status were involved.

Nonetheless, and notwithstanding it can be argued that the right to maintenance and cure arises out of the contract of employment and is an implied part thereof, the blunt fact remains that, as recognized by *O'Donnell*, in many instances it is more akin to reality to recognize maintenance and cure as a part of the tort compensation available to a seaman injured by the deficiencies or negligence of the vessel or its crew. Clearly, maintenance and cure represents a vivid illustration of the admiralty's lack of concern for the situs of the injury and its desire to bring within its protective scope personnel whose status is clearly maritime. Thus, this doctrine can well be considered an example of an exception to the strict locality rule not only judicially created but, in fact, a part of the constitutional grant. And, if this is so, it adds even more substance to the argument that physical boundaries need not, and should not, be a criterion used to determine the admiralty tort jurisdiction.

Most of the subsequent "exceptions" to the strict locality rule of the admiralty tort jurisdiction also involve seamen—a fact quite clearly at odds with a spatial test and in accord with a conceptual or, at least, a "status" test of the admiralty jurisdiction. Foremost of these subsequent exceptions is the Jones Act, giving to seamen or their personal representatives a tort cause of action enforceable, at the election of the plaintiff, in the admiralty. Here, it took the combined efforts of the legislature and the courts to break through the geographical barriers surrounding the admiralty jurisdiction. The legislature gave to seamen the right to seek compensation from their employers for personal injuries arising out of their maritime employment, and the courts concluded that such a right existed regardless of where the injury occurred. This conclusion, originally rejected by a series of inferior federal courts, was ultimately reached by the Supreme Court in *O'Donnell v. Great Lakes Dredge & Dock Co.*, where it was stated:

94. See cases cited in G. Robinson, Handbook of Admiralty Law in the United States 332 (1939) where, in a prefatory statement of black letter law, it is provided that:

The statute [Jones Act] covers injury, etc., to a seaman 'in the course of his employment.' It is a delictual statute read against the limitations of ordinary tort juris-
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[The]he Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle;\(^9\)

and in *Swanson v. Mara Brothers, Inc.*,\(^97\) where the Court, in discussing the Jones Act, stated:

> The jurisdiction of admiralty over such a cause of action depends, not on the place where the injury is inflicted . . . but on the nature of the seaman’s service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters.\(^98\) (Emphasis added).

Similarly, the Court of Appeals for the Fifth Circuit in *McKie v. Diamond Marine Co.*\(^99\) emphasized the immateriality of the situs of the occurrence, noting:

> The right of recovery under the [Jones] Act, as in the case of maintenance and cure, depends not on the place where the injury is inflicted, *this being wholly immaterial*, but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters . . . \(^100\) (Emphasis added).

Clearly, in an action based upon the Jones Act, the courts are not at all concerned with whether the injury occurred upon navigable waters or upon land, but look instead only to the questions historically basic to the admiralty jurisdiction—i.e., was the injured person a seaman; and, if so, was he acting within the scope of his maritime employment when so injured? If the admiralty is truly an accommodation of the interests of the shipping industry and of those who deal therewith, with its ultimate purpose being the furtherance of maritime commerce, no other criteria can be rationally justified.

Another inland extension of admiralty tort jurisdiction still in the growing stages has centered around the rapidly expanding maritime

\(^9\) 318 U.S. 36 (1943).
\(^96\) Id. at 43.
\(^97\) 328 U.S. 1 (1946).
\(^98\) Id. at 4.
\(^99\) 204 F.2d 132 (5th Cir. 1953). *See also*, Braen v. Pfeifer Oil Transportation Co., Inc., 361 U.S. 129 (1959).
\(^100\) Id. at 134.
concept of seaworthiness. The doctrine of seaworthiness is not a modern innovation, mention of it having been made in the admiralty courts of this nation as early as 1789.\textsuperscript{101} It was not until 1903, however, that the Supreme Court, in dicta, made clear that a seaman could recover damages from the vessel owner for personal injuries sustained as a result of the unseaworthiness of a vessel.\textsuperscript{102} The importance of this dicta was underscored by the fact that, until the enactment of the Jones Act in 1920, unseaworthiness provided the only remedy against an employer available to an injured seaman other than the traditional right to maintenance and cure. Consequently, actions based upon this concept flourished. The rapid growth of the doctrine was abruptly halted, however, with the enactment of the Jones Act and the resultant belief that a litigant had to elect at the outset whether to base his action upon the doctrine of unseaworthiness or negligence, and could not present both counts to the finder of fact. Since it was also believed that a claim based upon unseaworthiness must fail if it was factually determined that the injury resulted from operating negligence rather than the defective nature of the vessel or its appurtenances, and since such an illusory and difficult determination might not be made until the expiration of the Jones Act's three year statute of limitations, it became risky to proceed on the basis of unseaworthiness and the doctrine fell into relative disuse. Beginning in the 1940's, however, it became clear both that the injured seaman need not elect between the Jones Act or unseaworthiness—the finder of fact alone being compelled to make this choice—and that almost anything that constituted negligence would, additionally, constitute unseaworthiness.\textsuperscript{103} These factors, coupled with the obvious advantage of not having to prove negligence

\textsuperscript{101} See, Dixon v. The Cyrus, 7 F. Cas. 755 (No. 3930) (D. Pa. 1789). In Dixon, the court held that the unseaworthiness of a vessel gave a seaman the privilege of leaving without incurring penalties for desertion and without forfeiting wages. It did not hold that the doctrine of unseaworthiness gave a seaman the right to compensation for personal injuries.

\textsuperscript{102} The Osceola, 189 U.S. 158 (1903). There, at 175, the Court noted:

\textsuperscript{2} The law may be considered as settled upon the following propositions:

\textsuperscript{103} That a seaman need no longer "elect" between proceeding upon the basis of unseaworthiness or negligence, and may present evidence on both counts to the finder of facts, is now clear. See G. Gilmore and C. Black, The Law of Admiralty at 288 et seq. (1957), and the cases cited therein. That the term unseaworthiness included operating negligence was first made clear by Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944), and has been buttressed and expanded by a plethora of subsequent decisions.
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nor having to worry about being barred by a statute of limitations, spurred the further development of this long-dormant cause of action, including its judicial extension to injuries occurring on land. This is of particular significance, since it marks the first inland extension of a purely and clearly tortious nature occasioned in the admiralty without any legislative assistance whatsoever.\textsuperscript{104}

The judicial extension inland of the maritime doctrine of unseaworthiness was begun by Judge Learned Hand in \textit{Strika v. Netherlands Ministry of Traffic}\textsuperscript{105} and reached its present apex some fifteen years later in \textit{Gutierrez v. Waterman Steamship Corp.}\textsuperscript{106}

\textit{Strika} involved an action by a longshoreman to recover damages for injuries sustained on shore as a result of the alleged unseaworthiness of a vessel's gear. Defendant argued that since an action for unseaworthiness is a tort and since the injury occurred on land, the cause of action was not properly within the admiralty jurisdiction. In dismissing this contention, Judge Hand stated:

\begin{quote}
We should have found this a serious obstacle, were it not for \textit{O'Donnell v. Great Lakes Dredge & Dock Co.} \ldots and the \textit{ratio decidendi} of \textit{Swanson v. Marra Brothers, Inc.} \ldots; but those decisions appear to us to settle it that such 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. For it seems to us to follow, if Congress has power to impose liabilities in favor
\end{quote}

\textsuperscript{104} See the text at n. 92, \textit{supra}, where it is illustrated that the inland judicial extension of the admiralty jurisdiction in the area of maintenance and cure can conceivably be premised upon the contractual nature of that remedy. The same argument was made in regard to the maritime doctrine of unseaworthiness in \textit{Seas Shipping Co. v. Sieracki}, 328 U.S. 85 (1946), an action in which it was concluded that the shipowner's obligation to provide a seaworthy vessel extends to a stevedore—one with whom there is no contractual relationship. And, there the Court concluded that it was not proper to limit the relief afforded by the doctrine of unseaworthiness only to those—such as seamen—contractually related to the vessel owner. \textit{See also}, \textit{Strika v. Netherlands Ministry of Traffic}, 185 F.2d 555 (2d Cir. 1950), \textit{cert. denied}, 341 U.S. 904 (1951), where, at 558, Judge Learned Hand concluded that:

\begin{quote}
It would follow \ldots that the breach of the "obligation" to furnish a seaworthy ship is a tort; and that is a result consonant with the historical attitude towards breaches of warranty, which until 1778 had to be used in tort, and which may still be so treated if the distinction is important. \ldots
\end{quote}

Although it appears that the inland extension of the doctrine of unseaworthiness has been occasioned without any legislative assistance, it should be noted that Justice White's decision in \textit{Gutierrez v. Waterman Steamship Corp.}, 373 U.S. 206 (1963), \textit{rehearing denied}, 374 U.S. 858 (1963), can, arguably, be used to support the proposition that the Extension of Admiralty Jurisdiction Act made the inland extension of the doctrine of seaworthiness possible. It is not felt, however, that such a conclusion is valid when the problem is examined in context with the reasoning of those judicial decisions concluding that the Jones Act was applicable notwithstanding the situs of the injury was not upon navigable waters.\textsuperscript{105}

\textsuperscript{105} 185 F.2d 555 (2d Cir. 1950), \textit{cert. denied}, 341 U.S. 904 (1951).
of seamen for lapses of care on shore, that Congress at least would have power to impose a similar liability when the lapse is in furnishing a seaworthy ship. It is true that Congress has not intervened as to seaworthiness; yet there is no more reason to circumscribe more narrowly the duty, which The Osceola,... established as part of the maritime law, than the Constitution circumscribes the power of Congress, for both in the end are based upon the same provision. Moreover, we find confirmation for this in the 'obligation' of 'maintenance and cure' of a seaman injured on shore, for that is concededly quite as entirely the creature of the maritime law as the 'obligation' to furnish a seaworthy ship. For these reasons, although we have been unable to find a decision holding that a seaman, injured ashore by unseaworthy ship's gear, can recover, we have no doubt that he could; and, if a seaman can, we see no reason to question the ability of a longshoreman also to recover...107

Guitierrez not only gave Strika the imprimatur of the Supreme Court, but also made clear that the duty to provide a seaworthy vessel extends to the cargo as well as to the vessel and its appurtenances. Guitierrez, a longshoreman employed to unload the S.S. Hastings, was injured when he slipped on some loose beans on the dock adjacent to the vessel. The beans were alleged to have leaked from broken and defective bags, a part of the Hastings' cargo. More than three years after this occurrence, Guitierrez brought suit against the owner of the vessel alleging that the unseaworthiness of the vessel and the negligence of its officers and crew were the cause of his injuries. The District Court found for Guitierrez and, on appeal, the Court of Appeals for the First Circuit vacated the District Court's decree and remanded with a direction to dismiss the libel.108 In reversing the decision of the Court of Appeals, the Supreme Court first determined that maritime actions for unseaworthiness could be premised upon occurrences taking place entirely upon the shore, stating:

Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or seaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act... swept it away when it made vessels on navigable water liable for damage or injury

107. 185 F.2d at 558.
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'notwithstanding that such damage or injury be done or consumed on land.'109 (Emphasis added).

And, after reviewing Strika—which was not premised upon the Extension Act110—and those cases that followed it, the Court went on to state:

We agree . . . and hold that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier.111

While Gutierrez does make clear that it is solely the status of the person injured, and not the situs of the occurrence, that determines the applicability of the near absolute protection of the maritime doctrine of unseaworthiness, it does not disclose whether situs can be used to cut off or terminate that right, or to prevent that right from ever arising. The Court's decision, relying as it does both upon the Extension of Admiralty Jurisdiction Act and the reasoning of Strika, never quite makes clear whether either the Act or historical maritime precedent authorized the extension of the admiralty jurisdiction to Gutierrez' claim or whether both the legislative and judicial processes working in concert were necessary to achieve such a result. As will be pointed out later, such a distinction may be of vital significance should the inland encroachments of the Extension of Admiralty Jurisdiction Act be, as is probable, denied the far-ranging application of the Jones Act.112

109. 373 U.S. at 209.
111. 373 U.S. at 215.
112. For illustrations of the extent of the inland application of the Jones Act, see Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945) (vessel owner liable under Jones Act for injuries incurred by seaman when attacked by another member of the crew while returning to the vessel from a short shore leave and while some 150 to 200 meters from the vessel); and The Betsy Ross, 145 F.2d 688 (9th Cir. 1944) (seaman injured while taking fishing net from warehouse to vessel permitted to recover under Jones Act).

Ostensibly, decisions of this type and the language of the Supreme Court in Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959), make it clear that if a seaman is within the scope of his employment when injured he will be entitled to recover under the Jones Act regardless of how far removed from the vessel or from navigable waters the situs of his injury may be. Whether the same logical breadth of application will soon be given to the Extension of Admiralty Jurisdiction Act is, however, doubtful. While the Jones Act is obviously and solely concerned with the status of an individual—i.e., whether the individual is a seaman—the Extension Act, as evidenced by the inequities it sought to correct, seems more immediately concerned with damage directly or indirectly caused by vessels in the immediate shore or dock area. And, while it is readily apparent that seamen retain their status no matter how far from the vessel their employment may take them, neither legislative history nor the language of the Extension Act indicates that anything other than a limited inland extension of the admiralty jurisdiction was en-
In any event, the extension of the admiralty jurisdiction inland to encompass injuries to persons performing the traditional work of seamen constitutes another, and important, recognition of the significance of status and function and underscores the fact that often situs is in no way determinative of such matters.

The fourth, and final, important inland extension of the admiralty tort jurisdiction to be discussed here was accomplished by Congress in 1948 with the enactment of The Extension of Admiralty Jurisdiction Act, providing in part:

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

This Act was quite obviously designed to eliminate several of the more obvious inequities occasioned by a strict adherence to the locality principle. Illustrative of them are decisions that in collisions between a vessel and a land structure (such as a bridge or pier) the vessel could seek compensation for damage within the admiralty jurisdiction—and take advantage of the substantive, procedural and jurisdictional doctrines a part thereof—while the owner of the land structure was compelled to resort to the local law of the place of the occurrence in seeking relief. Similarly, the Act was intended to put an end to decisions that the maritime or non-maritime nature of a cause of action by one propelled overboard because of the negligence of the vessel or its crew was dependent upon so fortuitous an event as whether the unfortunate litigant happened to land upon the dock or in the body of water adjacent thereto. Obviously, even so entrenched a concept as envisioned by Congress. Thus, it would appear that if the doctrine of unseaworthiness is to be utilized to its fullest extent, its inland expansion should be premised upon a conceptual or status argument—as was true of the Jones Act—and not upon the 1948 Act.

114. Id.
115. That the inequities with which the legislature was most immediately concerned dealt with the inability of the owner of a pier, wharf or similar land structure damaged by a vessel to bring an action in the admiralty—or, in fact, to counterclaim in a maritime action commenced by the vessel owner—and with the unfairness of applying maritime substantive law to one claim and local terrestrial law, which could be vastly different, to the other, is illustrated by the correspondence urging passage of the Bill set forth in 1948 U.S. Code Cong. Service at 1898-1904. Nowhere in the legislative history is it even remotely indicated that the Extension of Admiralty Jurisdiction Act was intended to be the vehicle upon which an inland extension of the doctrine of unseaworthiness—which by 1948 was once more flourishing—could be premised.
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the "strict locality" rule could not be successfully invoked to prevent congressional intervention to end such bizarre results, often so seriously and pedantically reached.

However, while some of the more bizarre results have indeed been precluded from recurring, the Extension of Admiralty Jurisdiction Act has not yet solved all problems. Just how far inland is this Act to be applied? While, obviously, it brings the action of the aforementioned owner of the bridge pier within the admiralty tort jurisdiction, would it have applied to Gutierrez had he slipped on loose beans while carrying the cargo of the S.S. Hastings into a warehouse across the street from the dock? Or, had he slipped on the continuously leaking beans—as the Court of Appeals facetiously said—while laboring in a warehouse in Denver? And, even more important, can the Extension of Admiralty Jurisdiction Act in any way affect either status or the finding of a maritime connection, or must it be limited simply as a means of disregarding the situs of the occurrence so that causes clearly maritime can now be brought within the admiralty? These, clearly, are the critical questions; and, these are the questions that still remain to be solved.

At first, it was even uncertain if the Act applied to damage not directly and physically produced on the land by a vessel. Illustrative of this is *Hovland v. Fearnley & Eger*, where the court refused to apply a restrictive construction of the Act in an action brought by an employee of a ship chandler injured when struck by an overhead crane operated over tracks on the pier and adjacent to the vessel, concluding:

For an injury to be caused by a vessel within the meaning of the Act, it is not necessary that the vessel itself be the physical instrumentality producing it. The phrase covers injuries which result from acts of the vessel's personnel but, of course, with the limitation that the acts must be in some way connected with the vessel's service. The libellant's contention is that 'caused by the vessel' may be read to mean, caused by an act or omission of some of the vessel's personnel in the course of any activity involving the vessel. This interpretation would be broad enough to cover the case of an injury caused by a member of the crew driving an automobile miles inland to purchase or arrange for the delivery of equipment or supplies for the vessel. It is not necessary to decide whether this view can be sustained. One can go so far

as to say that if the injury results from an act of any of the vessel's personnel in the course of operating the vessel, rather than in the course of doing something which involves the vessel, jurisdiction could be sustained, even though the vessel itself is not an instrumentality in bringing about the accident.\textsuperscript{117} (Emphasis added.)

The Court of Appeals for the Ninth Circuit was, however, unwilling to use such broad language in \textit{Clinton v. Joshua Hendy Corporation},\textsuperscript{118} an action for alleged tortious interference with an advantageous contractual relationship. The court there held:

A consideration of the language of the statute . . . and the relevant legislative history . . . convince us that Congress did not intend to extend admiralty jurisdiction to a case such as this one. The committee reports and accompanying letters are concerned largely with damage to land structures caused by ships on navigable waters. \textit{In our view, the statute should not be construed to confer admiralty jurisdiction over onshore injuries unless the vessel itself or some accessory of it is directly involved}\textsuperscript{119} (Emphasis added).

This doubt whether it was necessary for some portion of the vessel itself to make the injury producing contact in order to invoke the Act was permanently laid to rest by the Supreme Court in \textit{Gutierrez v. Waterman Steamship 'Corp.}\textsuperscript{120} where Justice White, speaking for a nearly unanimous Court, stated:

Respondent and the carrier \textit{amici curiae} would have the statute [Extension of Admiralty Jurisdiction Act] limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman. . . . Nothing in the legislative history supports so restrictive an interpretation of the statutory language. \textit{There is no distinction in admiralty between torts committed by the ship itself and by the ship’s personnel while operating it, any more than there is between torts “committed” by a corporation and by its employees. . . . Various far-fetched hypotheticals are raised, such as a suit in admiralty for an ordinary automobile accident involving a ship’s officer on ship business in port, or for someone’s slipping on beans that continue to leak from these bags in a warehouse in Denver. We think it sufficient for the needs of those occasions to hold that the case is

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 658.
\item \textsuperscript{118} 285 F.2d 199 (9th Cir. 1960), cert. denied, 366 U.S. 932 (1960).
\item \textsuperscript{119} \textit{Id.} at 201-02.
\item \textsuperscript{120} 373 U.S. 206 (1963), rehearing denied, 373 U.S. 858 (1963).
\end{itemize}
within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act.\textsuperscript{121} (Emphasis added).

But, even Gutierrez, which rejects a restrictive interpretation of the Act, does not tell us whether Clinton was properly decided—it simply illustrates that the Clinton court may have gone a bit overboard in its choice of restrictive language. And, while Justice White obviously and quite reasonably would dismiss the contention that the Denver-based warehouseman could be the beneficiary of the maritime concept of seaworthiness, is his cavalier dismissal of such a remedy to ship personnel operating an automobile on ship business equally reasonable? Conceivably, a defective motor vehicle rented by the master of a vessel and driven by one on a ship’s errand—such as to procure needed supplies—might well give rise to an action for unseaworthiness, since it can be argued that such a vehicle was, at least for this specialized purpose, a part of the ship’s gear, and the gathering and procuring of supplies is certainly a traditional task of seamen. If this is so, could not recovery in such a case also be logically premised upon the Extension Act as “an injury, to person or property, caused by a vessel . . . notwithstanding that such damage or injury be done or consummated on land.”\textsuperscript{2}\textsuperscript{122}

Clearly, the question is not one that can be answered by attempting to set physical limitations to the inroad extensions of the admiralty jurisdiction any more than it could be solved by using the convenient presence of a clearly defined shoreline as the point beyond which the admiralty could not extend. The use of either device gives judicial sanction and recognition to an irrelevancy. As stated in Kent v. Shell Oil Company,\textsuperscript{123} “The extension of admiralty jurisdiction statute . . . does not . . . make a classic non-maritime, land-based injury into something else.” And, to paraphrase the court, nor should that Act ever make a classic, land-based, \textit{maritime} tort into something else!

In all instances—regardless of whether proceeding under the Extension Act, the Jones Act, the doctrine of unseaworthiness, or the provisions of the general maritime law, the criteria for applying the admiralty tort jurisdiction should be identical. Reason clearly dictates

\textsuperscript{121} Id. at 209-210.  
\textsuperscript{122} See text at note 114, \textit{supra}.  
\textsuperscript{123} 286 F.2d 746 (5th Cir. 1961).
that the warehouseman in Denver should not be treated as a seaman, and enabled to benefit from doctrines such as maintenance and cure or unseaworthiness which were especially tailored to the needs of men engaged in a perilous and transient profession. That is not to say, however, that a ship employee sent by his master from San Francisco harbor to Denver to obtain an urgently needed part of the vessel's gear should be similarly treated. Distance from navigable waters is, clearly, not the test. We are solely concerned with whether the essential nature of the occurrence is maritime and if it compels the application of the uniform substantive law and far-reaching procedures and remedies that are an inherent part of the admiralty. While it would be folly to say at this time that the courts and legislature have recognized this fact by making the inland incursions herein discussed, each such inroad does indicate an acute awareness that the traditional "strict locality" test of the admiralty jurisdiction does not always achieve a desired result. With such a significant crack in the dam, can we be far from a reasoned solution?

CRITIQUE AND SUGGESTED SOLUTION

The 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 results contrary to the very purposes of the admiralty. Early illustrations of this are found in the decisions holding that a seaman injured as a result of the unseaworthiness of the vessel or one of its appurtenances while standing on a dock or some other extension of the land had no maritime cause of action, although he may at the time of his injury have been actively engaged in performing a service directly related to the navigation of the vessel, while a civil action for kidnapping consummated on a vessel traversing navigable waters was within such jurisdiction, notwithstanding that it had no real connection with maritime commerce or navigation. More current illustrations every bit as out of step with history and reason are easily found.

124. For illustrations of cases holding that a parent may bring an action in tort in the admiralty for the wrongful abduction of a child, see Steele v. Thacher, 22 F. Cas. 1294 (No. 12,938) (D. Me. 1825) and Tillmore v. Moore, 4 F. 231 (D. Md. 1880). See also, Kamara v. The Atlantic Emperor, 97 F. Supp. 722 (E.D. Pa. 1951), where the court noted that where a libel alleged that respondents conspired to remove libellants from Ellis Island and to imprison them aboard a ship there might be a cause of action within the admiralty jurisdiction.
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To remedy such results, and to restore some semblance of reason to the maritime tort jurisdiction, both the courts and the legislature have created instances where the admiralty jurisdiction is applicable notwithstanding the injury resulting from the wrongful act or omission occurred someplace other than upon navigable waters. Each of these instances, which bring within the admiralty jurisdiction actions for maintenance and cure, for seaworthiness, for personal injuries or death sustained by a seaman during the course of his employment, and for damages caused by a vessel to structures or persons situated on the land, has been previously discussed. Each such instance is concerned with the subject matter of the occurrence, either providing a maritime remedy for persons having some connection with the navigation of vessels and the shipping industry or providing a maritime remedy for persons (regardless of whether maritime-connected) injured as a result of such maritime operations. In short, each of the instances, or exceptions, referred to was made necessary to remedy an unconscionable or bizarre result contrary to the history and purposes of the admiralty jurisdiction brought about by a strict application of the locality rule.

Admittedly, there has to be some point beyond which the admiralty jurisdiction must be deemed not to extend, and drawing the line at the water's edge—rather than drawing a conceptual line—is, at least patently, both convenient and clearly defined. Furthermore, supplementing such a clearly delineated boundary by exceptional instances, as the courts have done, goes a long way toward the desired goal of including within the admiralty jurisdiction actions based on all acts or omissions directly connected or concerned with maritime commerce and navigation. It is indeed conceivable that, with only a few more such extensions, or with the broad interpretation of the existing exceptional instances, such a goal will be achieved. But such a jurisdictional “solution” will not solve all problems inherent in the strict locality rule (Where, for instance, would it leave Mrs. McGuire or Mr. Chapman?) and would be of no assistance in assuring a proper inland extension of the admiralty.

The admiralty jurisdiction is far too important a matter to be

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125. That the strict locality test does not solve all the problems in this area, notwithstanding its apparent ease of application, is made clear in the numerous decisions attempting to determine precisely where the tort occurred (See, The Admiral Peoples, 295 U.S. 649 (1935)) and the cases concerned with whether the place of occurrence was upon navigable waters or upon an extension of the land. See also, note 87, supra.
premised upon so unsound and illogical a foundation. A plaintiff within that jurisdiction has available to him, at his option, the traditional maritime remedies of attachment and garnishment and process in rem, and whatever procedural, jurisdictional and discovery benefits yet distinguish civil actions of a maritime and non-maritime nature, including the more liberal venue provisions of the former proceedings. In addition, the more liberal maritime substantive law, including the concept of comparative negligence, may also benefit a plaintiff whose claim is characterized as maritime, and he often will not have to be concerned with statutes of limitation. The defendant, on the other hand, may find in some instances that he is in a position to claim the benefits of limitation of or exoneration from liability, should his claim be deemed maritime.

These remedies, procedures and defenses, are peculiarly a product of the needs and characteristics of the maritime industry, and are not necessarily well suited for general non-maritime application. Indeed, when so used, rather than assure just determinations, they quite often have the opposite effect. This makes it imperative that such remedies and offenses be limited solely to maritime situations, and not indiscriminantly applied to matters of a non-maritime nature which, fortuitously or not depending upon your position in a given case, happened to occur upon a body of navigable water. What conceivable need is there, for instance, to permit one bringing an action for injuries sustained when swimming into a submerged piling erected by a railroad in a navigable body of water to commence an action by attachment or garnishment of the railroad's assets, even though jurisdiction of the railroad could have been independently obtained within the district in an ordinary civil suit? The procedures of attachment, garnishment and in rem arrest were—and it is believed still are—intended to protect parties injured by far-ranging shipping interests and against whom suits might otherwise be impossible or prohibitively expensive to bring. Such procedures were not intended to provide means for obtaining immediate security nor for harassing or embarrassing the defendant, or making it so expensive for him to defend himself and restore his normal operations that he will willingly pay an inordinately large amount in settlement. There is no more justification for compelling the railroad in the above hypothetical situation to post bond to

126 In the absence of statutory provisions to the contrary, maritime actions are subject to the doctrine of laches rather than any state or federal statutes of limitations.
release its property or undergo the embarrassment and inconvenience that an attachment can cause when it is easily accessible to service than there would be in compelling one injured in America by a foreign vessel frequently visiting American ports to travel to the foreign nation to seek redress for his injuries. And yet, while no court has deigned to suggest the latter would be proper, the vast majority of American courts consistently permit results similar to the former to occur.

Obviously, the strict locality test for determining admiralty tort jurisdiction has not proved adequate. The fact that judicial and legislative extensions of the admiralty jurisdiction have remedied many of the wrongs inherent in the strict locality test does not completely eradicate or minimize its basic deficiencies. Torts not the slightest bit concerned with maritime matters can still fall within the scope of the strict locality test, while it is conceivable—if not probable—that some torts intimately and directly connected with maritime commerce and navigation will, under that test, continue to be excluded from the admiralty. We need only to allude once more to the hypothetical seaman, on ship's business, injured in Denver because of a defect in an automobile supplied by his employer. Notwithstanding the obvious connection of such an occurrence with maritime commerce, it would require an as yet unprecedented inland extension of the doctrine of seaworthiness or of the Extension of Admiralty Jurisdiction Act to treat an action by such a seaman against his employer as maritime.\textsuperscript{127} Clearly, as all-encompassing as the existing extensions of the admiralty tort jurisdiction may appear, it is probable that they do not come anywhere

\textsuperscript{127} The seaman in the course of his employment, regardless of where injured, would seem to be just the type of individual whom the admiralty should be designed to protect. In the hypothetical situation discussed, it might be difficult to prove any negligence on the part of the vessel, and thus the seaman would not come within the scope of the Jones Act—which has been the most liberally construed vehicle for extending the admiralty jurisdiction inland. See note 112, \textit{supra}. Yet, it is not too far-fetched to envision the rented automobile—at least for the limited purposes of the trip in question—as a part of the ship’s gear, and giving to the seaman a right of action against his employer based on the doctrine of unseaworthiness. Gutierrez, discussed in the text at note 108, \textit{supra}, seemingly ridicules an inland extension of this doctrine—though, admittedly, in an entirely different context—to Denver; and, in fact, the doctrine of unseaworthiness has never been extended such a distance. Yet, if such an extension of the admiralty jurisdiction is not made in a case of this nature, the seaman will be left only with an action against the car rental agency. If forced to bring such a suit, not only will the seaman—whose occupation may be extraordinarily transient in nature—possibly be greatly inconvenienced, but the substantive law ultimately applied to such an action will depend upon the conflicts of law rule of the district in which he is able to obtain jurisdiction over the defendant.

It would seem that this type of situation which, if left to local law, would subject the seaman to inconvenience and uncertainty, is conceptually within the admiralty jurisdiction. Under a strict locality test, however, it is unlikely that such a result will soon occur.
near covering all acts that should logically, reasonably and historically be included within the admiralty. In short, these exceptions—as beneficial as they often are—are not the panacea we seek and, in fact, may ultimately cause more harm than good by obscuring the obvious deficiencies of the strict locality rule in a maze of frequent good results.

One further bit of irony exists in that it was ever thought necessary to create these legislative and judicial extensions of the admiralty tort jurisdiction. The Constitution gives to the Supreme Court jurisdiction over “all Cases of admiralty and maritime Jurisdiction,”¹²捌 and it has been made abundantly clear that while maritime laws can be changed, modified or altered to meet existing conditions, all such changes are necessarily limited “... by the concept of the admiralty and maritime jurisdiction.”¹²玖 Thus, while the laws can change, the jurisdiction, regardless of judicial or legislative action, must necessarily remain stable. Clearly, for the courts or the legislature to label something “maritime” when it is not within the historical limitations of that jurisdiction will not cause the matter to be maritime. Similarly, to call something obviously maritime “non-maritime” will also be ineffectual, notwithstanding such action is given the imprimatur of judicial or legislative sanction. Matters are maritime or non-maritime not because treated as such by the courts or legislature, but solely because they deal with maritime commerce and navigation and, as such, have traditionally been subjected to the peculiar rights, remedies and duties of the admiralty. While the admiralty is—and, indeed, most certainly must be—flexible enough to adapt to a rapidly changing technology, it can never constitutionally be extended to areas of a non-maritime nature; and this should be just as true insofar as it applies to non-maritime matters occurring upon navigable waters as it applies to non-maritime matters occurring upon dry land. Thus, the extensions of the admiralty jurisdiction—which have, admittedly, done so much to alleviate the harm caused by the “strict locality” rule of the admiralty jurisdiction—are as unnecessary, if not as unreasonable, as the strict locality rule itself. If the matter is maritime, the Constitution and the Original Judiciary Act clearly provide that it shall be within the jurisdiction of the district courts, and no Act of Congress or judicial decision could properly decree otherwise.¹³ễn

¹²捌 U.S. Const. art III, § 2.
¹³ǽ If, in fact, a matter is within the admiralty jurisdiction, to deny one access to that
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The solution to the problem of determining an adequate criterion for ascertaining the admiralty tort jurisdiction clearly does not lie in a retention of the strict locality rule and a continuation of the present practice of creating legislative and judicial exceptions thereto to prevent obvious inequities. Such a "solution" would still permit matters obviously non-maritime to be treated as maritime simply because they occurred upon navigable waters and, possibly, require inland extensions now beyond comprehension to include within the admiralty all matters of a truly maritime nature. Nor does the courageous approach of Campbell,131 McGuire132 and Chapman133 in creating a "locality plus" rule solve the problem. While such a rule, as applied in the latter two of those cases, did serve the desirable purpose of excluding from the admiralty jurisdiction matters not properly therein, it would still make "locality" the keystone for inclusion in the admiralty and, consequently, require the same inland extension "devices" now an inherent part of the strict locality rule.

The solution, insofar as one can be said to exist, must begin by remedying the anomalous practice of using a different test to determine whether a tort is within the jurisdiction of the admiralty than is used to determine whether a contract is maritime.134 This practice, mysteriously established by the judges of this then fledgling nation nearly two centuries ago, cannot be justified by either precedent or jurisdiction would be to deprive him of his constitutional rights. Thus, if the strict locality test does exclude from the admiralty matters that should be included therein had a proper test been applied, one so denied the right to proceed within the admiralty could argue that his constitutional rights have been violated.

Notwithstanding that such a constitutional cause of action does exist, it would seem unnecessary to pursue since the question of admiralty jurisdiction—as is true of the denial of a constitutional right—also gives rise to an action cognizable in the federal courts and ultimately reviewable by the Supreme Court, and the arguments made in both causes would be identical—i.e., that historically and logically the seaman's cause should be cognizable within the admiralty as made a part of our law by the Constitution. Thus, the denial of the seaman's right to proceed within the admiralty might well merge with the jurisdictional question. Such an approach might, however, open possible new avenues to seamen so deprived premised upon a denial of due process.

131. Campbell v. H. Hackfeld & Co., 125 F. 696 (9th Cir. 1903).
134. Location has never been relevant in the United States to determine whether a contract is or is not maritime. Thus, no court would hold that a contract, made on board a vessel between two passengers, for the sale of shares of stock or for a piece of real property, the ultimate transfer also occurring on board the vessel, is cognizable within the admiralty jurisdiction. Yet, under the strict locality test a suit by one such passenger for physical injuries caused by the other during an altercation arising out of such dealings would be deemed maritime. That such torts should be no more subject to the peculiarities of the admiralty than the aforementioned contracts should be self-evident.

See note 7, supra, for authority clearly illustrating that contracts are deemed maritime or non-maritime strictly in relation to the subject-matter with which they are concerned, with both the situs of execution and performance being irrelevant.

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reason and should no longer be perpetuated.\textsuperscript{135} The only valid criterion of the admiralty jurisdiction is the relation of the matter—whether it be tortious or contractual in nature—to \textit{maritime commerce}. It would be no more rational to attempt to justify the retention of a separate body of substantive and, still to a large extent, procedural laws\textsuperscript{136} to cover matters just because they occurred upon navigable waters than it would be to retain a separate body of laws and procedures applicable only to matters occurring on land areas above 7,000 feet in altitude. Location is, and should be, irrelevant. What is relevant and does justify the continued existence of separate maritime laws and procedures are the practical realities of the situation 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—whether furnishing supplies, services, or shipping goods—are, consequently, entitled to remedies and defenses peculiarly fitted to such ventures and should not be subjected to the idiosyncrasies of each port’s local law. Similarly, because of the perils of the industry, those employed to man and operate vessels and who are injured as a result thereof are entitled to special and uniform laws especially geared to cover such occurrences. Such laws not only assure the availability of a reasonably fair remedy to those connected or dealing with the maritime industry no matter where the injury or dispute may arise, but also give to all concerned—merchant, seaman and vessel owner—the ability to know in advance of the undertaking the rights and liabilities that will apply should some breach or disaster occur.

In sum, the international near-uniformity (and national uniformity) of the admiralty, by working an accommodation of the often competing interests of merchants, servicemen, seamen and vessel owners, furthers and enhances the shipping industry and helps assure its

\textsuperscript{135} See note 10, \textit{supra}, for a discussion of the English prohibitive writs limiting the admiralty jurisdiction of that nation. That such limitations of the English admiralty did not restrict the admiralty powers of the courts of the United States was made clear by, \textit{inter alia}, DeLovio \textit{v.} Boit, 7F. Cas. 418 (No. 3776) (C.C. D. Mass. 1815), and The Lottawanna, 88 U.S. (21 Wall.) 558 (1874). \textit{See also, 7A J. Moore, Federal Practice, ¶ .200[2] at 2031-41 (2d ed. 1966).}

\textsuperscript{136} Notwithstanding the coalescence of admiralty and civil procedures in 1966, differences remain. Illustrative of this are the Supplemental Rules, applicable only to causes within the admiralty jurisdiction, and various other amendments to the Civil Rules not generally applicable to all causes. For a listing and discussion of the Federal Rules of Civil Procedure that were amended or altered to effectuate the coalescence of admiralty and civil procedure, see \textit{7A J. Moore, Federal Practice} ¶ ¶ .50[1]-.90 at 375-635 (2d ed. 1966).
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continued existence. This, then, is the purpose—the sole purpose—for the continued existence of a separate body of admiralty laws—i.e., to work an accommodation of interests of all whose presence and participation is necessary to make maritime commerce feasible and, by so doing, to encourage all these diverse groups to engage or assist in maritime ventures. Once it is determined that a jurisdictional test does not enhance, or even minimally fulfill, this fundamental purpose—as is uniformly true of the tests premised in whole or in part on “locality”—it can no longer validly exist. Clearly, the time to scrap the relevancy of locality and to coalesce the jurisdictional tests for maritime torts and contracts is long overdue. Admiralty jurisdiction, like the vessels and men to whom it applies, must, finally, be propelled into the Twentieth Century.