



ARTICLES

After the Flood: Cleaning Up the Test for Admiralty Jurisdiction Over Tort

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[O]n that Day all the Fountains of the great Deep burst forth, and the Windows of the Heavens were opened. . . . And the Waters prevailed so mightily upon the Earth that all the high Mountains under the whole Heavens were covered.

Genesis 7:11, 19.

INTRODUCTION

On April 13, 1992, the City of Chicago "sprung a leak."¹ A freight tunnel running under the Chicago River collapsed that day. Water entered the breach and quickly spread throughout a web of tunnels located beneath the City's downtown business district, an area more commonly known as the "Loop." Buildings throughout the Loop were flooded, causing widespread damage and power outages. Offices were evacuated at midday and the

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¹ Mike Royko, *Putting in a Plug for City that Leaks*, CHI. TRIB., Apr. 14, 1992, at 3.

Loop was declared both a state and federal disaster area.² The ensuing flood resulted in business and personal losses estimated at almost one billion dollars.³ In addition, the Chicago River, a navigable waterway, was closed to shipping for over one month while repairs were made to the tunnel.

Tens of thousands of businesses and individuals, led by Jerome B. Grubart, Inc., a shoe store, joined in over fifty class-action and individual lawsuits against both the City of Chicago and Great Lakes Dredge & Dock Company, an entity hired by the City to replace pilings in the riverbed. Great Lakes was accused of causing the flood by negligently driving the piles in a way that breached the tunnel. Great Lakes responded to these suits by filing a petition for limitation of liability under the Limitation of Vessel Owner's Liability Act,⁴ an act which allows an owner whose ship caused an accident to limit its liability to the value of the vessel involved. In this case, the value of the vessel involved was approximately \$633,940.

Both the injured parties and the City of Chicago challenged Great Lakes's right to limit its liability, arguing that admiralty jurisdiction did not apply. They contended that land-based law should govern the prosecution of the underlying actions because all of the injuries were sustained on land. Great Lakes, however, countered that any tort committed by a vessel is cognizable in admiralty, irrespective of whether the damage occurred on land.

The jurisdictional question posed by the "Great Chicago Flood" was one that the United States Supreme Court had seemingly left open in its most recent opinions dealing with admiralty jurisdiction over tort.⁵ Past cases usually framed the issue in terms of interference with commercial shipping. For example, the Court recently articulated the test for admiralty jurisdiction as focusing on whether the incident created a "potential hazard

² *In re* Great Lakes Dredge & Dock Co., No. 92-C6754, 1993 U.S. Dist. LEXIS 16256, at *1 (N.D. Ill. Feb. 18, 1993), *rev'd sub nom.* Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993), *and aff'd sub nom.* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995).

³ United States Supreme Court Official Transcript at 2, Wednesday, October 12, 1994, Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995) (Nos. 93-762, 93-1094).

⁴ 46 U.S.C. app. §§ 181-96 (1988).

⁵ See *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

to maritime commerce.”⁶ Thus, although courts allowed admiralty jurisdiction to attach when damage was caused to land-based structures, such cases usually involved vessels in navigation.⁷ None of the reported cases appear to have involved a shoe store damaged by a flood that occurred six months after a pile was driven into an underground freight tunnel.

The injured parties contested admiralty jurisdiction precisely because their injuries were remote in both time and place from the situs of any vessel’s wrongful act. They argued that a “totality of the circumstances” test was required to determine whether admiralty or land-based law was appropriate in a case in which those suffering damage had no connection with maritime commerce.⁸ The United States Court of Appeals for the Fifth Circuit developed this test in *Kelly v. Smith*.⁹ It required courts to consider four factors before determining the existence of a maritime relationship.¹⁰ These “*Kelly* factors” had been utilized by a number of courts to determine whether a particular case had the required “nexus” to traditional maritime activity to be cognizable in admiralty.¹¹

⁶ *Sisson*, 497 U.S. at 362 (quoting *Foremost*, 457 U.S. at 675 n.5).

⁷ See *In re Oil Spill by Amoco Cadiz off the Coast of Fr. on March 16, 1978*, 699 F.2d 909 (7th Cir. 1983) (holding that admiralty jurisdiction attached to claims against shipbuilder for on-shore damage resulting from oil tanker spill), *cert. denied*, 464 U.S. 864 (1983); *United States v. Matson Navigation Co.*, 201 F.2d 610 (9th Cir. 1953) (holding that cause of action for damage to dike struck by tugboat was cognizable in admiralty); *In re Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991) (finding admiralty jurisdiction in connection with oil tanker spill); *In re Hercules Carriers, Inc.*, 614 F. Supp. 16 (M.D. Fla. 1984) (applying admiralty jurisdiction to suit for damage to bridge caused by vessel); *Sulphur Terminals Co. v. Pelican Marine Carriers, Inc.*, 281 F. Supp. 570 (E.D. La. 1968) (holding that admiralty jurisdiction attached to suit for damage to wharf caused by tank vessel); *Shell Oil Co. v. Steamship Tynemouth*, 211 F. Supp. 908 (E.D. La. 1962) (finding action for damage to terminal facilities struck by vessel within admiralty jurisdiction).

⁸ *In re Great Lakes Dredge & Dock Co.*, No. 92-C6754, 1993 U.S. Dist. LEXIS 16256, at *7-9 (N.D. Ill. Feb. 18, 1993), *rev’d sub nom.* *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993), *and aff’d sub nom.* *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995).

⁹ 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

¹⁰ The four *Kelly* factors are: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) the traditional concepts of the role of admiralty law. *Id.* at 525.

¹¹ See, e.g., *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) (applying factors similar to those set out in *Kelly*).

Although widely used by the lower courts,¹² the *Kelly* factors did not offer much concrete guidance in determining whether a particular tort was within admiralty jurisdiction. They were primarily part of a policy-driven analysis designed to preclude jurisdiction from attaching when a tort had no connection with matters considered traditionally maritime. Lower courts were thus able to use the *Kelly* factors to keep cases without any direct connection to maritime activity out of the federal courts.¹³

The Supreme Court used the *Chicago Flood* case to further clarify the proper test for admiralty jurisdiction over tort. This resulted in a complete repudiation of the use of the *Kelly* factors and all such policy-driven jurisdictional tests. After the *Flood*, the test for jurisdiction has been simplified — but only to a degree. While the *Kelly* factors have been discarded, courts are still left with no real guidance for determining whether a tort falls within admiralty jurisdiction. In place of the four-factor *Kelly* test, courts are left with a two-part “nexus” test that is equally as vague. More importantly, this nexus test is prone to manipulation by judges intent on limiting admiralty jurisdiction as much as possible. The end result will be continuing uncertainty and confusion.

This Article will examine the test for admiralty jurisdiction over tort following *Jerome B. Grubart, Inc. v. Great Lakes Dredge &*

¹² See, e.g., *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1051-52 (11th Cir. 1989) (applying *Kelly* factors in finding no admiralty jurisdiction over boat owner's claim for exoneration from liability in connection with marina fire); *Guidry v. Durkin*, 834 F.2d 1465, 1471 (9th Cir. 1987) (finding personnel decision regarding vessel's engine room to be traditional maritime activity under *Kelly* analysis); *Bubla v. Bradshaw*, 795 F.2d 349, 351-53 (4th Cir. 1986) (analyzing *Kelly* factors and concluding that admiralty jurisdiction applied to wrongful death action stemming from marine surveyor's death on marina); *Drake v. Raymark Indus., Inc.*, 772 F.2d 1007, 1016 (1st Cir. 1985) (finding, under *Kelly*-type analysis, no admiralty jurisdiction over shipbuilder employee's negligence claim alleging asbestos-related injuries), *cert. denied*, 476 U.S. 1126 (1986); *Oman v. John-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985) (finding asbestos-related injuries to land-based shipbuilding employee did not meet four-factor test required for admiralty jurisdiction), *cert. denied*, 474 U.S. 970 (1985); *Solano v. Beilby*, 761 F.2d 1369, 1371 (9th Cir. 1985) (applying *Kelly* factors in holding that admiralty jurisdiction applied to action of longshoreman injured on ramp of vessel); *Edynak v. Atlantic Shipping Inc. Cie. Chambon Maclovio S.A.*, 562 F.2d 215, 221 (3d Cir. 1977) (finding *Kelly* factors satisfied when longshoreman struck by crane bucket while aboard vessel), *cert. denied*, 434 U.S. 1034 (1978).

¹³ See, e.g., *Olney v. South Carolina Elec. & Gas Co.*, 488 F.2d 758 (4th Cir. 1973) (holding that admiralty jurisdiction did not reach accident involving diver injured when he struck submerged boat).

*Dock Co.*¹⁴ It will begin by briefly examining the development of the test for admiralty tort jurisdiction throughout the years. Next, it will examine the Supreme Court's recent holding in *Grubart* in light of the traditional locality test, paying particular attention to the argument that admiralty jurisdiction should not be exercised when there is no commercial maritime interest at stake. The Article will then argue that the Court's most recent attempt to clarify the jurisdictional inquiry is inadequate and will only serve to provoke a more subtle form of policy analysis, one which will tempt lower courts to make decisions on the merits of a case in the way they frame the jurisdictional question. Finally, the Article will conclude by arguing for a return to the traditional locality rule as a means of achieving both certainty in application and uniformity of law.

I. THE DEVELOPMENT OF THE TEST FOR ADMIRALTY JURISDICTION OVER TORT

A. *The Locality Rule*

The traditional test for determining whether a tort was within admiralty jurisdiction turned on the locality of the wrong. Under the rule of *The Plymouth*,¹⁵ if the act giving rise to the complaint took place on water, it was cognizable in admiralty; if it took place on land, it was not.¹⁶ The term "locality" as used in

¹⁴ 115 S. Ct. 1043 (1995).

¹⁵ 70 U.S. (3 Wall.) 20 (1865).

¹⁶ *See id.* at 36. The *Plymouth* Court specifically stated:

The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality — the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

Id. *See also* DeLovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, J., on circuit) (holding that admiralty jurisdiction is determined by locality of tort or injury); *cf.* 13 Rich.2 ch. 3 (1392) (Eng.) (codifying locality rule in English law during Richard II's reign); Thomas L. Mears, *The History of the Admiralty Jurisdiction*, in 2 SELECT ESSAYS IN ANGLo-AMERICAN LEGAL HISTORY 312, 328 (Association of American Law Schools ed., 1908) (indicating that, during Edward III's reign, civil jurisdiction in admiralty included torts and offenses on high seas); DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 41-42 (1970) (discussing English statutes created to ensure that admiralty jurisdiction covered only matters arising at sea).

the early cases generally referred to the situs of the negligent act. The United States Supreme Court limited admiralty jurisdiction to claims stemming from acts occurring on the "high seas" or "navigable water"¹⁷ of the United States.¹⁸

As time progressed, dissatisfaction with this strict locality rule increased, particularly because it sometimes produced absurd results.¹⁹ Cases involving injuries caused by vessels or their crews and equipment were often held to be outside the scope of admiralty jurisdiction simply because the injured party was on land.²⁰ Moreover, admiralty courts were precluded from hearing cases involving damage to land-based structures caused by ships or other watercraft even when the structures were integrally involved in maritime activity.²¹ Indeed, even maritime locality

¹⁷ The term "high seas" is usually understood to encompass waters at least one sea league from the coast. *Findlay v. The William*, 9 F. Cas. 57, 61-62 n.4 (D. Pa. 1793) (No. 4,790). "Navigable water" is an expansion of the earlier tidewater concept of locality and includes any body of water "on which commerce is carried on between different states or nations." *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454 (1851).

¹⁸ *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 258 (1972). In *Victory Carriers v. Law*, 404 U.S. 202, 205 n.2 (1971), the Court was able to cite 37 cases in support of the locality rule. As a result, "generations of admiralty practitioners and students believed that the locality test alone was controlling." *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 227 (7th Cir. 1993), *aff'd sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995).

¹⁹ Erastus C. Benedict was one of the first to express displeasure with the locality rule:

It may, however, be doubted whether the civil jurisdiction, in cases of tort, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violation of maritime right and duty which occur in vessels in 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 that the Admiralty would have jurisdiction of the action for the tort.

ERASTUS C. BENEDICT, *THE LAW OF AMERICAN ADMIRALTY* 173 (1850).

²⁰ See, e.g., *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928) (holding that no admiralty jurisdiction existed when longshoreman standing on pier was struck by ship's cargo sling and knocked into water). *But see Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935) (holding that jurisdiction existed when longshoreman standing on deck of ship was struck by ship's cargo sling and thrown to pier).

²¹ See *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865) (holding that no admiralty jurisdiction existed for damage caused to wharf and several adjoining buildings when fire aboard ship moored to wharf spread); *Johnson v. Chicago & Pac. Elevator Co.*, 119 U.S. 388 (1886) (finding no admiralty jurisdiction in connection with ship striking grain elevator); *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886) (finding no admiralty jurisdiction when mill caught fire after cinders from steamship stack ignited wood). *But see The Blackheath*, 195 U.S. 361 (1904) (holding that admiralty jurisdiction existed over claims

could not create jurisdiction when the structure was fixed in some way to the land.²²

The absurdities prompted by a strict adherence to the locality test were alleviated somewhat by the passage of the Admiralty Extension Act in 1948.²³ The Act provided that “[t]he 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.”²⁴ The purpose of the Extension Act was to “end concern over the sometimes confusing line between land and water”²⁵ by extending admiralty jurisdiction to all cases in which damage was caused by a vessel on navigable waters.

The Extension Act largely eliminated the rule of *The Plymouth* by allowing cases in which vessels damaged bridges, terminals, and wharves to be within admiralty jurisdiction.²⁶ Some close cases remained, however, particularly when the damage did not involve a direct collision or allision with a vessel. Courts held that the damage must at least have been caused by an appurtenance of the ship for the Extension Act to apply, but the degree of causation required between the appurtenance and the injury was sometimes difficult to determine.²⁷

arising from damage to navigation beacon even when fixed to land, because aids to navigation have traditionally been subject to admiralty jurisdiction).

²² See, e.g., *Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908) (holding that no admiralty jurisdiction existed when ship struck center span of bridge located in middle of navigable channel).

²³ Extension of Admiralty Jurisdiction Act, ch. 229, 62 Stat. 496 (1948) (codified at 46 U.S.C. app. § 740 (1988)).

²⁴ 46 U.S.C. app. § 740.

²⁵ *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1047 (1995).

²⁶ See, e.g., *In re Hercules Carriers, Inc.*, 614 F. Supp. 16 (M.D. Fla. 1984) (holding damage to bridge within admiralty jurisdiction); *Sulphur Terminals Co. v. Pelican Marine Carriers, Inc.*, 281 F. Supp. 570 (E.D. La. 1968) (finding that suit brought by wharf owner against operator of vessel for docking damage was within admiralty jurisdiction); *Shell Oil Co. v. Steamship Tynemouth*, 211 F. Supp. 908 (E.D. La. 1962) (holding action for damages to terminal building caused by vessel within admiralty jurisdiction).

One of the most interesting cases involving the scope of the Extension Act involved a collision between a train and a vessel whose bow was protruding over the shore. The owners of the train filed a suit in admiralty for damages to the train. The court allowed recovery, taking time to note that the train had been “seaworthy” at the time. *Chicago, B. & Q. R.R. v. The W.C. Harms*, 134 F. Supp. 636 (S.D. Tex. 1954).

²⁷ Compare *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963) (holding claim of

B. The Nexus Test

1. *Executive Jet's* Rejection of the Locality Rule and Adoption of the Nexus Test

Although the Extension Act alleviated some of the harshness of the *Plymouth* rule, the locality rule itself was still subject to criticism. Over time, lower courts began to limit the reach of admiralty jurisdiction over tort. Refusing to merely follow the locality rule, these courts required some sort of additional maritime connection for jurisdiction to attach.²⁸

The United States Supreme Court reconsidered the continued legitimacy of the locality rule in *Executive Jet Aviation, Inc. v. City of Cleveland*.²⁹ *Executive Jet* involved an airplane which crashed into Lake Erie after striking a flock of seagulls while taking off. Although the crash had a maritime situs, the Court refused to allow the application of admiralty jurisdiction because the incident did not have a nexus or connection to traditional maritime

longshoreman injured when he slipped on coffee beans unloaded from ship within admiralty jurisdiction) *with Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971) (holding claim of longshoreman injured by forklift on pier not within admiralty jurisdiction).

Courts also took a broad view of what constitutes an appurtenance. *See Hassinger v. Tideland Elec. Membership Corp.*, 781 F.2d 1022 (4th Cir. 1986) (finding defective ship mast to be an appurtenance), *cert. denied*, 478 U.S. 1004 (1986); *Torres v. Hamburg-Amerika Linie*, 353 F. Supp. 1276 (D.P.R. 1972) (holding that defective cargo containers were appurtenances); *Hovland v. Fearnley & Eger*, 110 F. Supp. 657 (E.D. Pa. 1952) (holding that land-based crane used to discharge cargo was an appurtenance).

²⁸ *See, e.g., Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 966 (6th Cir. 1967) (upholding dismissal of suit brought by swimmer injured while diving into shallow water). Specifically, the *Chapman* court held:

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.

Id. See also Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972) (finding no admiralty jurisdiction in connection with auto accident on floating pontoon serving as ferry landing). The *Peytavin* court stated: "[W]e find it appropriate to note that in general the courts have denied maritime tort jurisdiction where the circumstances of a suit failed to demonstrate any substantial connection with maritime activities or interests." *Id.* at 1127. For another decision in which the court refused to follow the locality rule, see *McGuire v. City of N.Y.*, 192 F. Supp. 866 (S.D. N.Y. 1961) (ruling that accident involving swimmer at public beach was not within admiralty jurisdiction).

²⁹ 409 U.S. 249 (1972).

activity. The Court noted that the increasing variety and complexity of waterborne activity meant that locality alone was no longer a practical jurisdictional test.³⁰ The Court also questioned the wisdom of using admiralty rules to determine negligence in an airplane case:

[T]he mere fact that the alleged wrong “occurs” or “is located” on or over navigable waters — whatever that means in an aviation context — is not of itself sufficient to turn an airplane negligence case into a “maritime tort.” It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity.³¹

2. Clarifying the Nexus Test: The *Kelly* Factors

Although the holding in *Executive Jet* was specifically limited to airplane accidents, lower courts began to adopt the nexus test as a jurisdictional prerequisite for all admiralty torts. The major problem with this new jurisdictional test, however, was that the Supreme Court had failed to define the precise nature of “traditional maritime activity.” While the new test recognized the premise that admiralty jurisdiction was created to address the special needs of waterborne commerce,³² it provided little guidance as to the type of analysis required of lower courts attempting to determine the appropriate scope of jurisdiction.³³ This

³⁰ *Id.* at 254-56.

³¹ *Id.* at 268.

³² *See, e.g., McGuire*, 192 F. Supp. at 870-71 (indicating that admiralty jurisdiction originated from early customs of sea, which commercial people “adopted in principle as law”). The *McGuire* court specifically stated:

Admiralty was the result of commerce on the high seas; the commerce made possible by sailing vessels. Just as vessels were the source of admiralty, they remain the focal point of admiralty jurisdiction. In very general terms, admiralty jurisdiction relates to things occurring on or to vessels or as a result of the employment of vessels.

Id. at 871.

³³ *See Phyllis D. Carnilla & Michael P. Drzal, Foremost Insurance Co. v. Richardson: If This Is Water, It Must be Admiralty*, 59 WASH. L. REV. 1, 4 (1983) (stating that *Executive Jet* left job of defining traditional maritime activity to lower courts); Comment, *Admiralty Jurisdiction over Pleasure Craft Torts*, 36 MD. L. REV. 212, 220-26 (1976) (noting courts’ conflicting interpretations of relevant policy considerations underlying *Executive Jet* decision); Madeleine B. Johnson, Note, *Admiralty Jurisdiction—Not Limited To Commercial Activity*, 58

was especially problematic in borderline cases. When the incident involved ocean-going vessels carrying cargo or passengers for hire, there was usually no problem finding admiralty jurisdiction. When the connection to maritime commerce was less obvious, however, courts usually struggled with the question of whether admiralty jurisdiction was appropriate.³⁴

In *Kelly v. Smith*,³⁵ by the United States Court of Appeals for the Fifth Circuit decided the first appellate case to address this issue. *Kelly* involved a group of deer poachers in a boat who were injured by gunfire from the shore; the poachers had been fleeing from a hunting preserve located on an island in the Mississippi River. In attempting to resolve the question left open by the Supreme Court in *Executive Jet*, the Fifth Circuit held that courts should consider four factors in determining whether a particular incident bears a significant relationship to traditional maritime activity. These factors are: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) the traditional concepts of the role of admiralty law.³⁶

The four *Kelly* factors quickly became the leading tests for determining whether a maritime nexus was present in cases lacking any obvious commercial maritime connection.³⁷ The

TUL. L. REV. 376, 378-79 (1983) (explaining that *Executive Jet's* traditional maritime activity test led to inconsistent results).

³⁴ See *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975) (discussing applicability of admiralty jurisdiction to small pleasure craft). In *Richards*, the United States Court of Appeals for the Fourth Circuit was confronted with the case of an 18-foot motorboat that exploded while being refueled. The court questioned whether there was any federal interest in applying the uniform admiralty rules to pleasure craft, but it felt constrained to hold that the case was within admiralty jurisdiction simply because the Supreme Court had found admiralty jurisdiction in other pleasure craft cases. The Fourth Circuit refused jurisdiction in another case involving a pleasure craft as well. See *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973) (holding that admiralty jurisdiction did not reach case involving water skier injured when driver of tow boat ran boat into shallow waters).

³⁵ 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

³⁶ *Id.* at 525.

³⁷ See, e.g., *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1051 (11th Cir. 1989) (applying *Kelly* factors to case involving liability for marina fire); *Guidry v. Durkin*, 834 F.2d 1465, 1471 (9th Cir. 1987) (applying *Kelly* factors to defamation action against civilian employed as chief engineer on naval vessel); *Bubla v. Bradshaw*, 795 F.2d 349, 351 (4th Cir. 1986) (applying *Kelly* factors to wrongful death action brought against boat and pier owners); *Drake v. Raymark Indus. Inc.*, 772 F.2d 1007, 1015 (1st Cir. 1985) (applying *Kelly* factors to asbestos exposure suit brought by shipyard employee); *Edynak v. Atlantic*

problem with the *Kelly* factors, however, is that they are as vague as the Supreme Court's reliance in *Executive Jet* on the phrase "traditional maritime activity." They provide almost no real guidance for determining whether a particular incident falls within admiralty jurisdiction. The *Kelly* opinion itself gave no indication as to whether some of the factors are to be given more weight than others or whether it is enough to merely make a minimal showing for each of them.³⁸ The *Kelly* factors have thus been subject to a wide variety of interpretations.³⁹

Eventually, the Fifth Circuit supplemented the four *Kelly* factors with three additional factors.⁴⁰ These factors were designed

Shipping Inc. Cie. Chambon Maclovio S.A., 562 F.2d 215, 221 (3d Cir. 1977) (applying *Kelly* factors to personal injury action brought by longshoreman against shipping company); *St. Hillaire Moye v. Henderson*, 496 F.2d 973, 978-79 (8th Cir. 1974) (applying *Kelly* factors to case brought to recover damages resulting from accident involving small pleasure craft), *cert. denied*, 419 U.S. 884 (1974).

³⁸ Some courts, including the *Kelly* court itself, seem to have required only a minimal showing for each of the elements. The *Kelly* court noted that the person injured most seriously by the gunfire was the man at the tiller, whom it characterized as the "pilot." The "vehicle" involved was a boat (albeit one only 15 feet in length). The shotgun which caused the injuries was "not so inherently indigenous to land as to preclude any maritime connection." Finally, the court held that "upholding admiralty jurisdiction does not stretch or distort long evolved principles of maritime law." *Kelly*, 485 F.2d at 525-26.

Other courts have placed differing emphasis on the factors. In *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634 (5th Cir. 1985), another panel of the Fifth Circuit seemed to require more of a showing for each of the factors than the *Kelly* court did and considered the fourth factor, the traditional concepts of the role of admiralty law, the most important factor. *Woessner* involved products liability claims brought by shipyard workers against an asbestos manufacturer. Admiralty jurisdiction was held not to apply, primarily because neither the product nor the manufacturer was "uniquely tied to the maritime industry." While a vessel was involved, its involvement was "at most tangential." *Id.* at 643-49.

In *King v. Universal Elec. Constr.*, 799 F.2d 1073 (5th Cir. 1986), still another Fifth Circuit panel complained that the *Kelly* test forced it to take jurisdiction over the death of an electric company lineman who fell from a boat and drowned while preparing to pull lines across a river. The court was "doubtful" that there was any admiralty interest in the accident, but it decided there was "no more violence done to the traditional concepts of the role of admiralty law by according [the] widow an admiralty remedy than was done in granting one to the head poacher" in *Kelly*. *Id.* at 1075. See also *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 231 (4th Cir. 1985) (holding that fourth *Kelly* factor is most important).

³⁹ See, e.g., *In re Sisson*, 867 F.2d 341, 345 n.2 (7th Cir. 1989) (rejecting *Kelly* factors entirely, noting that they are not "helpful in developing the kind of analysis indicated by *Executive Jet*"), *rev'd on other grounds sub nom.* *Sisson v. Ruby*, 497 U.S. 358 (1990); see also STEVEN F. FRIEDEL, 1 BENEDICT ON ADMIRALTY § 171 (5th ed. 1990) (discussing difficulty lower courts have had in interpreting nexus test).

⁴⁰ These supplemental factors include: "(1) the impact of the event on maritime ship-

to more carefully consider whether a particular incident has a "maritime flavor." But whether these three new factors replace the four *Kelly* factors or are to be added to them to make a seven-factor test has never been clear.⁴¹

Nonetheless, courts using either the three-, four-, or seven-factor *Kelly* test still had difficulty deciding cases at the margins.⁴² This was particularly true where the vehicles involved were pleasure craft. Some courts held that "traditional maritime activity" meant "commercial activity," while others did not require any commercial connection at all.⁴³ More importantly, the

ping and commerce (2) the desirability of a uniform national rule to apply to such matters and (3) the need for admiralty 'expertise' in the trial and decision of the case." *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003 (1989). The dissent in *Kelly* itself had argued for the inclusion of a fifth test which would have considered whether the assertion of admiralty jurisdiction involves a "potential conflict with applicable state law." *Kelly*, 485 F.2d at 527 (Morgan, J., dissenting).

⁴¹ See, e.g., *Ciolino v. Sciortino Corp.*, 721 F. Supp. 1491 (D. Mass. 1989) (adding three new factors from *Mollet* to *Kelly* factors); *Miller v. Griffin-Alexander Drilling Co.*, 685 F. Supp. 960 (W.D. La. 1988) (seeming to supplement four *Kelly* factors with three additional factors).

⁴² Compare *Parker v. Gulf City Fisheries, Inc.*, 803 F.2d 828 (5th Cir. 1986) (holding in malpractice action that doctor advising ship captain's wife about captain's condition was sufficiently connected to maritime activity for admiralty jurisdiction to attach) and *Fawcett v. Pacific Far East Lines*, 76 F.R.D. 519 (N.D. Cal. 1977) (finding malpractice claim for negligent examination of seaman within admiralty jurisdiction) with *Hiner v. Longstaff*, 543 F. Supp. 1123 (W.D. Wash. 1982) (finding suit for negligence by paramedics in treating injured seaman on pier not within admiralty jurisdiction). Compare *Kunreuther v. Outboard Marine Corp.*, 715 F. Supp. 1304 (E.D. Pa. 1989) (finding no admiralty jurisdiction over claim brought by injured scuba diver) with *Lyon v. Ranger III*, 858 F.2d 22 (1st Cir. 1988) (finding injured scuba diver's claim within admiralty jurisdiction) and *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277 (W.D. Pa. 1983), *aff'd*, 738 F.2d 423 (3d Cir. 1983) (holding same as *Lyon* court), *cert. denied*, 469 U.S. 858 (1984).

Compare also *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256 (4th Cir. 1991) (allowing airborne "fish spotter" to assert claim in admiralty because he performed traditional maritime activity), *Roberts v. United States*, 498 F.2d 520 (9th Cir. 1974) (finding admiralty jurisdiction in case involving plane crash on high seas), *cert. denied*, 419 U.S. 1070 (1974), and *Higginbotham v. Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La. 1973) (holding that admiralty jurisdiction existed in connection with airplane crash in Gulf of Mexico) with *Executive Jet*, 409 U.S. at 259 (holding that admiralty jurisdiction did not attach to aviation accident).

⁴³ See, e.g., *Weinstein v. Eastern Airlines*, 316 F.2d 758, 761 (3d Cir. 1963) (stating that only requirement for admiralty jurisdiction is that tort occurred in navigable waters), *cert. denied*, 375 U.S. 940 (1963). Compare *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973) (finding no admiralty jurisdiction over pleasure craft accident because pleasure craft have no connection with commercial shipping) with *St. Hillaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974) (holding that pleasure craft are within admiralty jurisdiction because they can have an impact on shipping).

Kelly factors seemed to unnecessarily complicate the analysis when waterborne vehicles were involved. As noted above, the holding in *Executive Jet* was specifically limited to aviation accidents; nothing in the decision justified applying the nexus test to non-aviation claims. It did not completely reject the locality

In a decision that can only be described as "freakish," the United States Court of Appeals for the Seventh Circuit held that admiralty jurisdiction reached an accident resulting in the death of a man on a canoe trip sponsored by a municipal parks department. *Glenview Park Dist. v. Melhus*, 540 F.2d 1321 (7th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). The man drowned when the canoe he was paddling struck a low-hanging tree branch. *Id.*

Two of the more bizarre cases that explored the question of what constitutes traditional maritime activity involved allegations against the U.S. Military. In *T.J. Falgout Boats, Inc. v. United States*, 508 F.2d 855, 857 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975), the United States Court of Appeals for the Ninth Circuit found admiralty jurisdiction when a tugboat was struck by a Sidewinder missile launched from a Navy jet off the coast of California. The court said that the release of the missile presented a hazard to maritime activity and the airplane's activities were maritime in nature. *Id.* In a strikingly similar case, a family cruising in Long Island Sound had their boat shelled by artillery from a military installation. *Szyka v. United States Secretary of Defense*, 525 F.2d 62, 63 (2d Cir. 1975). The court noted that the shelling, even if from shore, bore a "significant relationship to traditional maritime activity." *Id.* at 64.

A number of commentators have argued that commercial shipping is at the heart of admiralty jurisdiction. *See, e.g.*, James A. George, *Maritime Tort Jurisdiction: A Survey of Developments From Executive Jet to Foremost Insurance Co. v. Richardson*, 24 S. TEX. L.J. 495, 510 (1983) (concluding, after surveying maritime tort jurisdiction, that significant relationship to traditional maritime activity is necessary to invoke admiralty jurisdiction); Charles H. Livaudais, Jr., *Cruising into Federal Court: The Availability of Federal Admiralty Jurisdiction for Pleasure Craft Cases After Foremost Ins. Co. v. Richardson*, 12 TUL. MAR. L.J. 347, 357-58 (1988) (arguing that admiralty jurisdiction should only extend to truly traditional maritime activities); Preble Stolz, *Pleasure Boating and the Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 665-71 (1963) (tracing history of English, colonial, and federal admiralty jurisdiction and concluding that "the original purpose and the sole modern justification for federal admiralty law is the promotion and protection of . . . commerce by water.") Stressing the importance of uniformity in federal jurisdiction, Stolz observes that "[c]ommerce and uniformity go together. . . . But where commerce stops, the need for uniformity also ends." *Id.* at 671. Stolz then concludes that, absent this concern for uniformity, federalism concerns should prevail, and thus state courts should have jurisdiction over cases that do not implicate trade. *Id.*

Many of the difficulties in the pleasure boating context seem to have arisen because few reported cases discuss pleasure boats. This is because pleasure boats were a relatively uncommon phenomenon until the latter part of the this century. *Id.* at 666; *see also* Jeffrey L. Raizner, Note, *Missing the Boat — Another Failed Attempt to Define Admiralty Jurisdiction: Sisson v. Ruby*, 29 HOUS. L. REV. 733, 743-44 (1992) (observing that, in nineteenth and early twentieth centuries, majority of activity on navigable waterways was commercial in nature, and virtually all claims related to navigation thus arose in commercial context, rendering unnecessary an explicit jurisdictional tie to commerce).

alone test when vessels were involved.⁴⁴ Thus, the application of the locality-plus-nexus test outside the context of aviation accidents was an expansion of the Supreme Court's actual holding in *Executive Jet*.⁴⁵

3. *Foremost's* Broadening of the Nexus Test

The Supreme Court attempted to resolve the confusion in *Foremost Insurance Co. v. Richardson*.⁴⁶ *Foremost* involved a collision between two pleasure boats on the Amite River in Louisiana which resulted in the death of one of the operators. The Court determined that the locality-plus-nexus test adopted for aviation accidents in *Executive Jet* was applicable to all maritime tort actions.⁴⁷ It thus restricted admiralty jurisdiction to those torts that had both a significant connection to traditional maritime activity and a maritime locus. This restriction applied regardless of whether a vessel was involved. However, the Court also pointed out that the maritime activity at issue need not be exclusively commercial in order for it to be considered "traditionally maritime."⁴⁸ Although the Court recognized that the protection of commercial shipping is the "primary focus" of admiralty jurisdiction, it noted that the federal interest in protecting maritime commerce cannot be adequately protected unless operators of all vessels are subject to uniform rules of conduct.⁴⁹

The *Foremost* decision had the effect of broadening the nexus test by specifically refusing to limit the concept of traditional maritime activity to commercial activity. It also clarified the nexus test somewhat by allowing errors in navigation to satisfy the nexus test when they have a potential to disrupt maritime commerce. However, *Foremost* did not go any further towards defining the phrase "traditional maritime activity" than did *Executive*

⁴⁴ *Executive Jet*, 409 U.S. at 268.

⁴⁵ See, e.g., *Kelly v. United States*, 531 F.2d 1144, 1146 (2d Cir. 1976) (stating that, "*Executive Jet* merely adds to [the locality rule] the additional requirement that the acts and omissions must significantly relate to traditional maritime activity").

⁴⁶ 457 U.S. 668 (1982).

⁴⁷ *Id.* at 673-75.

⁴⁸ *Id.*

⁴⁹ *Id.* at 674-75. As an example of this principle, the Court posited a collision between two pleasure craft at the mouth of the St. Lawrence Seaway disrupting commercial traffic. *Id.*

Jet. The Court additionally provided no guidelines for determining how close a navigational error must be to causing a disruption to commerce for the nexus test to be satisfied.⁵⁰ As a result, lower courts continued to have difficulty determining the appropriate scope of the nexus test.⁵¹ Indeed, some courts simply limited *Foremost* to its facts, requiring some sort of defect or error in the navigation of a vessel for admiralty jurisdiction to apply in cases in which the vessel itself was not engaged in commercial activity.⁵²

4. Sisson's Two-Step Analysis of the Nexus Requirement

The Supreme Court again attempted to define the nexus test in *Sisson v. Ruby*.⁵³ *Sisson* involved a fire that erupted in the washer/dryer unit of a yacht moored at a marina. The fire spread to other vessels and to the marina itself. No commercial vessels were moored at the marina, nor were any affected in any other way. The owner of the yacht sought to invoke the provisions of the Limitation of Vessel Owner's Liability Act.⁵⁴ The *Sisson* Court, drawing on the *Foremost* opinion, ultimately held that admiralty jurisdiction is appropriate "when a 'potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity.'"⁵⁵

⁵⁰ Raizner, *supra* note 43, at 748.

⁵¹ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 227 (7th Cir. 1993), *aff'd sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995). Compare *Oliver by Oliver v. Hardesty*, 745 F.2d 317, 320 (4th Cir. 1984) (finding nexus test satisfied when swimmer was injured by negligently driven pleasure boat) and *Medina v. Perez*, 733 F.2d 170, 171 (1st Cir. 1984) (holding same as *Oliver* court), *cert. denied*, 469 U.S. 1106 (1985) with *Foster v. Peddicord*, 826 F.2d 1370, 1375 (4th Cir. 1987) (holding nexus test not satisfied when swimmer injured while diving from pleasure boat into shallow water), *cert. denied*, 484 U.S. 1027 (1988) and *Reed v. United States*, 604 F. Supp. 1253, 1268 (N.D. Ind. 1984) (holding same as *Foster* court).

⁵² See, e.g., *Souther v. Thompson*, 754 F.2d 151, 153 (4th Cir. 1985) (asserting allegation of navigational error to be key to admiralty jurisdiction when dealing with small pleasure craft); *Kunreuther v. Outboard Marine Corp.*, 715 F. Supp. 1304 (E.D. Pa. 1989) (requiring that complaint of swimmer injured by small boat allege navigational error for admiralty jurisdiction to attach).

⁵³ 497 U.S. 358 (1990).

⁵⁴ In particular, the yacht's owner pointed to 46 U.S.C. app. § 183(a) in an attempt to limit his liability. *Sisson*, 497 U.S. at 360. For the text of this statute, see *infra* note 70.

⁵⁵ *Sisson*, 497 U.S. at 362 (quoting *Foremost*, 457 U.S. at 675 n.5).

Under *Sisson's* two-step analysis of the nexus requirement, courts are first required to "assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity."⁵⁶ The Court held that this inquiry into whether a particular accident will disrupt maritime commerce should turn on the *potential*, rather than the *actual*, effects of the incident.⁵⁷ Using this analysis, the Court held that a fire on a vessel docked at a marina on a navigable waterway posed a threat to maritime commerce.

The second part of *Sisson's* analysis of the nexus requirement involves a consideration of whether a substantial relationship exists "between the activity giving rise to the incident and traditional maritime activity."⁵⁸ The Court held that the activity should be "defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose."⁵⁹ In *Sisson*, the relevant activity was defined as "the storage and maintenance of a vessel at a marina on navigable waters."⁶⁰ It was, therefore, only necessary to inquire whether this activity showed "a substantial relationship to a 'traditional maritime activity' within the meaning of *Executive Jet* and *Foremost*."⁶¹ The storage of a vessel at a marina was found to have a substantial relationship to traditional maritime activity because marinas serve the essential maritime purpose of providing a place of refuge as well as a place for supplies and repairs.⁶²

⁵⁶ *Id.* at 363.

⁵⁷ Specifically, the *Sisson* Court held:

We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the *actual* effects on maritime commerce of the fire on *Sisson's* vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the *Ullorian* more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.

Id.

⁵⁸ *Id.* at 364.

⁵⁹ *Id.* *Sisson* reaffirmed *Foremost's* holding that a substantial relationship with *commercial* maritime activity is not necessary to a finding of maritime jurisdiction. *Id.* at 362.

⁶⁰ *Id.* at 365.

⁶¹ *Id.*

⁶² *Id.* at 367.

The *Sisson* opinion confused the jurisdictional inquiry somewhat by requiring courts to predict, albeit not with complete accuracy, whether a particular incident would have had the potential to disrupt commercial activity. More importantly, however, the opinion did little to clarify the test for admiralty jurisdiction. By requiring courts to focus on the “general conduct from which the incident arose” in defining the relevant activity,⁶³ the Court opened the way to a great deal of subjectivity and inconsistency. Because courts are left with little guidance, this test is open to manipulation, depending on whether a judge desires to find admiralty jurisdiction or not. The *Sisson* Court characterized the activity at issue in that case as the storage and maintenance of a vessel on navigable waters. Another court, however, might have characterized the same activity as defective repair or maintenance of a household appliance.⁶⁴

The lack of guidance provided by the *Sisson* opinion left many courts struggling to find coherent standards for determining whether the general conduct of an activity bears a substantial relationship to traditional maritime activity. Some courts have consequently continued to utilize the *Kelly* factors,⁶⁵ while others have expressed doubt regarding the viability of these factors after *Sisson*.⁶⁶ The problems inherent in this analysis were made amply clear when the Chicago River inundated basements in the Loop.

⁶³ *Id.* at 364.

⁶⁴ See STEVEN F. FRIEDEL, 1 BENEDICT ON ADMIRALTY § 171 (5th ed. Supp. 1994).

⁶⁵ See, e.g., *Sinclair v. Soniform Inc.*, 935 F.2d 599, 602 (3d Cir. 1991) (applying *Kelly* factors and finding admiralty jurisdiction over injured diver’s claim against crew of vessel that transported him to dive site); *Broughton v. Offshore Drilling, Inc. v. South Cent. Mach., Inc.*, 911 F.2d 1050, 1052 (5th Cir. 1990) (applying *Kelly* factors and allowing in admiralty claim brought by offshore drilling company against land-based hydraulic repair businesses).

⁶⁶ See *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993) (declaring proper jurisdictional inquiry to be more rigidly structured than under *Kelly* analysis), *aff’d sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995).

II. AFTER THE FLOOD: *JEROME B. GRUBART, INC. v. GREAT LAKES DREDGE & DOCK CO.*

A. *History of the Case*

The Chicago River is an inland navigable waterway approximately twenty-four miles long, connecting the Chicago Harbor on Lake Michigan with the Mississippi River via the Illinois Waterway System. In May 1991, the City of Chicago entered into a contract with Great Lakes Dredge & Dock Company to remove and replace wooden piling clusters around the piers of several bridges spanning the River. These clusters, also called "dolphins," were used to protect both the bridges and ships from alliding with each other. They also aided in navigation in that they were used as points of reference for river traffic. Additionally, tugboat pilots used the dolphins for "warping," a maneuver in which the dolphins served as fulcrums to turn barges in close quarters. An extensive network of underground freight tunnels ran underneath the River near several of the bridges at which the repair work was to be done; but the City apparently failed to advise Great Lakes of the existence of the tunnel network.⁶⁷

Great Lakes used a tug and two barges to fulfill the contract. The barges, however, had no motive power of their own and were towed about the river by other vessels. The barges were then "spudded" to the riverbed while work was done on the piles. One of the barges was equipped with a crane to pull out the old pilings and drive in the new ones. The other barge was used to transport the pilings to and from the work site. Great Lakes completed its work on the pilings in September 1991.

More than six months after the work had been completed, in April 1992, one of the underground tunnels near the Kinzie Street Bridge collapsed. Water entered the tunnel and rapidly spread throughout the tunnel network. The water eventually entered the basements of buildings throughout the Loop, causing widespread power outages and other damage. After a mid-day evacuation, the entire downtown area was declared a disaster area.

⁶⁷ Brief for Respondent Great Lakes Dredge & Dock Co. at 3-4, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995) (Nos. 93-762, 93-1094).

With estimates of damage totalling almost one billion dollars, fifty class action lawsuits were filed in both state and federal court against Great Lakes and the City of Chicago.⁶⁸ The plaintiffs alleged that Great Lakes had negligently driven pilings into the riverbed so as to cause either a breach or a weakening of the underwater tunnel. They accused the City of failing to properly maintain the tunnels and failing to discover the breach and make proper repairs.⁶⁹

Great Lakes responded to the suits by filing a petition for limitation of or exoneration from liability under the Limitation of Vessel Owner's Liability Act (Limitation Act).⁷⁰ This act permits a vessel owner to seek a stay of suits filed against it in state courts and allows a federal district court, sitting in admiralty, to determine the issue of negligence.⁷¹ Moreover, the Limitation

⁶⁸ *In re* Great Lakes Dredge & Dock Co., No. 92-C6754, 1993 U.S. Dist. LEXIS 16256, at *1-5 (N.D. Ill. Feb. 18, 1993), *rev'd sub nom.* Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993), *and aff'd sub nom.* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995).

⁶⁹ Brief for Petitioner City of Chicago at 4, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995) (Nos. 93-762, 93-1094) [hereinafter Chicago Brief].

⁷⁰ Section 183(a) of the Limitation Act provides as follows:

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. app. § 183(a).

⁷¹ A shipowner seeking limitation petitions the district court for exoneration or limitation. 46 U.S.C. app. § 185. Upon the filing of such a petition and the posting of an adequate bond, the court must enjoin all other proceedings against the shipowner which involve issues arising out of the same subject matter as the limitation proceeding. *Ex Parte Green*, 286 U.S. 437, 440 (1932). In *Green*, the Court issued a "monition" to all potential claimants inviting them to file their claims in the federal court action. *Id.* at 438. The district court, sitting in admiralty, must then determine "whether there was negligence, whether the negligence was without the privity and knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed." *In re Dammers*, 836 F.2d 750, 755 (2d Cir. 1988) (quoting *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979)). The injured parties, who are referred to as "claimants," must agree to have their claims adjudicated by the federal court; however, they may pursue their state court remedies if they agree to stipulate both to the federal court's right to adjudicate the issue of liability and that they will not seek damages in excess of the limitation fund. *See*

Act limits the owner's liability for torts committed without the owner's privity or knowledge to the value of the vessel and freight involved, which in Great Lakes's case amounted to \$633,940.⁷² The prospect of having one of the primary actors in the drama use the Limitation Act not only to limit its liability but also to prevent a state court from hearing the claims pushed the plaintiffs to seek a dismissal of the petition for limitation. Moreover, the City, whose liability would have been limited by state statute if the cases were tried in state court,⁷³ also sought to have Great Lakes's petition dismissed.

The United States District Court for the Northern District of Illinois dismissed the limitation petition.⁷⁴ Relying on the four-factor *Kelly* test,⁷⁵ which it described as a "totality of circumstances test," the court held that admiralty jurisdiction did not reach the tort. Although Great Lakes argued that the Admiralty Extension Act conferred jurisdiction,⁷⁶ the court placed great emphasis on the fact that most of the damage in question was suffered by land-based entities, none of which were involved in maritime activity.

Even if the locality prong of the *Executive Jet* test was satisfied through the Extension Act, the court held that Great Lakes must still show that it was engaged in traditional maritime activity for admiralty jurisdiction to attach.⁷⁷ After considering the totality of the circumstances under the *Kelly* factors, the court ruled that Great Lakes's pile-driving activities could not be considered traditional maritime activity within the scope of *Executive Jet* and *Foremost*. Rather, the court opined that Great Lakes was

Michael L. Bono, *Protective Stipulations and the Single Claimant Exception in Limitation of Liability Proceedings*, 17 TUL. MAR. L.J. 257 (1993) (containing detailed discussion of required stipulations).

⁷² Chicago Brief, *supra* note 69, at 5.

⁷³ In the state court litigation, the City argued that its liability was limited by § 8-101 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/8-101 (1995).

⁷⁴ *In re Great Lakes Dredge & Dock Co.*, No. 92-C6754, 1993 U.S. Dist. LEXIS 16256, at *1 (N.D. Ill. Feb. 18, 1993), *rev'd sub nom.* *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993), *and aff'd sub nom.* *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995).

⁷⁵ See *supra* note 10 (setting out four-factor test established in *Kelly*).

⁷⁶ *In re Great Lakes*, 1993 U.S. Dist. LEXIS 16256 at *17.

⁷⁷ *Id.* at *25-26.

merely repairing of a land-based structure with no particular navigation or maritime commercial interest.⁷⁸ Finding that no traditional maritime activity was involved led the court to dismiss the case because the federal interest in providing for uniformity in maritime law was not implicated:

In summary, the relevant facts alleged to be present in this now historic calamity to our [C]ity do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this specialized set of rules. Traditional common law rules of tort and contract should do quite nicely in the resolution of the material disputes here; the specialization of admiralty rules is not necessary. The totality of the circumstances lead unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and suppl[ies] none of the causation for the alleged injuries. There are no traditional maritime concerns present here and, without it, no admiralty jurisdiction.⁷⁹

On appeal, the United States Court of Appeals for the Seventh Circuit reversed.⁸⁰ It completely rejected the district court's use of the *Kelly* factors in the jurisdictional analysis. The Seventh Circuit held that policy considerations such as those relied upon by the lower court⁸¹ were no longer relevant after *Sisson*. Instead, it held that, in determining whether jurisdiction attaches, courts are only permitted to ask three questions about the incident giving rise to the alleged wrong: "(1) did it occur on the navigable waters of the United States? (2) did it pose a

⁷⁸ *Id.* at *21-22.

⁷⁹ *Id.* at *27-28. The Court also rejected Great Lakes's argument that the Limitation Act provided an independent basis of federal jurisdiction. *Id.* at *31-32.

⁸⁰ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993), *aff'd sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995).

⁸¹ *See supra* notes 78-79 and accompanying text (discussing district court's dismissal of limitation petition after finding that federal interest in maritime law uniformity was not implicated).

potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity?”⁸² If all three of these questions are answered in the affirmative, admiralty jurisdiction is proper. The Seventh Circuit also recognized the difficulties inherent in applying the totality of the circumstances test, noting that its reliance on policy analysis⁸³ is bound to produce different results depending on the weight different courts give to the various factors. Indeed, the court noted that a “[s]imilar policy analysis would likely have yielded a different result in *Sisson* itself.”⁸⁴

Using the three-prong *Sisson* analysis, the Seventh Circuit reviewed the incident leading up to the Flood and found admiralty jurisdiction. First, it held that the locality test was satisfied because Great Lakes’s vessels were located on the navigable waters of the United States.⁸⁵ More importantly, it held that the Admiralty Extension Act applied to give jurisdiction over the claims of the land-based plaintiffs, notwithstanding that their injuries were remote in both time and place from the allegedly wrongful act. Although an earlier United States Supreme Court decision had held that the damage must occur “at a time and place not remote from the wrongful act,”⁸⁶ the Seventh Circuit interpreted this to be a rule of “temporal proximity” akin to a “specialized rule of proximate causation.”⁸⁷ The lapse of six months between the completion of Great Lakes’s pile driving activities was not thought to constitute remoteness in time. In addition, the fact that the water was carried to faraway places by

⁸² *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d at 228.

⁸³ *See Kelly*, 485 F.2d at 525 (specifically describing fourth factor wherein court is required to make decisions on basis of “traditional concepts of the role of admiralty law”).

⁸⁴ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d at 228.

⁸⁵ *Id.* at 229. The fact that the piles themselves were outside the navigable channel was of no consequence. *Id.*

⁸⁶ *See Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). In *Gutierrez*, a longshoreman was injured when he slipped on beans that had fallen out of a bag being unloaded from a ship. *Id.* at 207. The shipowner contended that the Extension Act did not apply because there was no contact with the ship. *Id.* at 209. The Supreme Court, however, found jurisdiction, holding that a case is within admiralty jurisdiction when “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.” *Id.* at 210.

⁸⁷ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d at 229.

the “fortuitous existence of an elaborate tunnel system” did not mean that the damage was remote in place.⁸⁸

In discussing whether the incident posed a potential disruption of maritime commerce — the first part of the *Sisson* nexus test — the Seventh Circuit held that the pile driving activity in question not only had the potential to disrupt commerce, but actually did so, causing the closing of the Chicago River for over one month.⁸⁹ The court’s interpretation of this aspect of the test seems somewhat confused, however, because in focusing on the pile driving, the court seemed to concentrate on the activity which led to the incident rather than on the incident itself. *Sisson* directed lower courts to focus on the actual incident causing the damage to see whether it posed a potential hazard to commerce.⁹⁰ In this case, that would have meant focusing on the flood, not the pile driving. Nonetheless, the Seventh Circuit concluded that the first prong of the *Sisson* nexus test was satisfied.⁹¹

The Seventh Circuit also had little difficulty in finding that the pile-driving activity giving rise to the incident in question showed a substantial connection to traditional maritime activity and thus satisfied the second part of the *Sisson* nexus test. Although Grubart and the City contended that the pile driving was undertaken to protect a land-based structure, the court held that the piles were closely connected to maritime activity because they protected ships from collisions and served as aids in navigation.⁹² Pile driving in this case was, therefore, substantially related to traditional maritime activity within the context of *Sisson*.

B. The Supreme Court’s Decision

On appeal to the United States Supreme Court, Grubart and the City primarily argued that the Seventh Circuit had erred in

⁸⁸ *Id.*

⁸⁹ *Id.* at 230. The court specifically confronted the rhetorical question: “Did the installation of pilings from barges located in the navigable channel of the Chicago River create a potential to disrupt commercial maritime activity?” *Id.*

⁹⁰ *See supra* note 56 and accompanying text (discussing first part of *Sisson* nexus test).

⁹¹ *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d at 230.

⁹² *Id.*

rejecting the *Kelly* totality of the circumstances test.⁹³ They argued that the *Sisson* test could not be mechanically applied, particularly when all the parties involved were not themselves involved in maritime commerce. The petitioners contended that their case posed different problems than those posed in *Executive Jet* and *Foremost*. In those earlier cases, all of the parties were involved in similar forms of activity. In *Executive Jet*, all of the parties were involved in aviation;⁹⁴ in *Foremost*, all were involved in recreational boating.⁹⁵ Grubart and the City argued that the fact that Great Lakes was the only entity involved in commercial maritime activity, while the injured parties were all land-based entities, made a totality of the circumstances test necessary. Such a test would prevent federal courts from taking jurisdiction over cases that are more properly handled by state courts applying state law.⁹⁶ Relying on the oft-stated principle that admiralty jurisdiction exists to protect maritime commerce,⁹⁷ the petitioners contended that principles of federalism require federal courts to ensure that federal admiralty jurisdiction is only invoked in those cases in which the federal interest in protecting maritime commerce is implicated.⁹⁸

Despite the petitioners' arguments, the Supreme Court affirmed the Seventh Circuit's decision.⁹⁹ The Court first reviewed the development of the test for admiralty jurisdiction over tort. It resolved a minor question plaguing some courts by reaffirming that maritime location is still a prerequisite to admi-

⁹³ Brief for Petitioner Jerome B. Grubart, Inc. at 12-14, *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043 (1995) (Nos. 93-762, 93-1094) [hereinafter Grubart Brief]; Chicago Brief, *supra* note 69, at 6, 16.

⁹⁴ *Executive Jet*, 409 U.S. at 250-51.

⁹⁵ *Foremost*, 457 U.S. at 669.

⁹⁶ Petitioners essentially relied on a footnote in *Sisson*, in which the Supreme Court stated that "[d]ifferent issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not." *Sisson*, 497 U.S. at 365 n.3.

⁹⁷ See Stolz, *supra* note 43, at 667 (noting that, historically, "civil jurisdiction of admiralty was exclusively concerned with matters arising from maritime commerce"); see also *Kelly*, 485 F.2d at 527 (Morgan, J., dissenting) (explaining that purely commercial origins and purposes of admiralty law derived from strong federal interest in controlling interstate and foreign commerce through rules tailored to waterborne transportation).

⁹⁸ Grubart Brief, *supra* note 93, at 8-16; Chicago Brief, *supra* note 69, at 16-32.

⁹⁹ *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1047 (1995).

rality jurisdiction.¹⁰⁰ More importantly, it also rejected the application of a totality of the circumstances approach.¹⁰¹ The Court then attempted to clarify the jurisdictional analysis by holding that:

After *Sisson*, . . . a party seeking to invoke federal admiralty jurisdiction . . . over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must "assess the general features of the type of incident involved," to determine whether the incident has "a potentially disruptive impact on maritime commerce" Second, a court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."¹⁰²

The Court rejected the argument that a totality of the circumstances approach was needed to prevent cases having little to do with maritime commerce from being brought within the scope of federal admiralty jurisdiction. It noted that "the *Sisson* tests are aimed at the same objectives" as the multifactor tests, namely preventing admiralty jurisdiction from attaching when there is no rationale to support it.¹⁰³ The Court also rejected the argument that the *Sisson* tests do not apply when land-based parties are involved:

If the tort produces no potential threat to maritime commerce or occurs during activity lacking a substantial relationship to traditional maritime activity, *Sisson* assumes that the objectives of admiralty jurisdiction probably do not require its exercise, even if the location test is satisfied. If, however, the *Sisson* tests are also satisfied, it is not apparent why the need for admiralty jurisdiction in aid of maritime commerce somehow becomes less acute merely because land-based parties happen to be involved.¹⁰⁴

¹⁰⁰ After *Sisson*, some federal courts had expressed doubt that maritime location was a prerequisite to admiralty jurisdiction. See *infra* note 127 (noting post-*Sisson* confusion over locality requirement).

¹⁰¹ *Grubart*, 115 S. Ct. at 1053-54.

¹⁰² *Id.* at 1048 (citations omitted).

¹⁰³ *Id.* at 1053-54.

¹⁰⁴ *Id.* at 1054.

The Court also noted that, while there might be some oddity in having the rights of land-based parties adjudged in admiralty, it would be equally odd to force an entity engaged in traditional maritime activity, such as Great Lakes, into state court.¹⁰⁵ It also recognized that the various multifactor tests do not lend themselves to predictability because they require too delicate a balancing act on the part of local courts merely to determine whether they have jurisdiction to hear a case.¹⁰⁶

The basis of the petitioners' arguments was that "[a] multiple factor test would minimize, if not eliminate, the awkward possibility that federal admiralty rules or procedures will govern a case, to the disadvantage of state law, when admiralty's purpose does not require it."¹⁰⁷ In other words, admiralty jurisdiction should not displace the states' right to adjudicate what would otherwise be state tort claims. The *Kelly* factors are, in this view, merely designed to allow courts to preserve the appropriate balance between the interests of the states and those of the federal government.¹⁰⁸ While the petitioners recognized that *Sisson* disapproved of using multifactor tests when all the parties were engaged in maritime activity, they argued that *Sisson* specifically left open the possibility of using such tests when, as here, most of the parties were land-based.¹⁰⁹ Thus, when land-based parties are involved, a federal court should "satisfy itself that the totality of the circumstances reflects a federal interest in protecting maritime commerce" with sufficient clarity to justify shifting the litigation from state to federal court.¹¹⁰

In rejecting this argument, the Supreme Court noted that the "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law."¹¹¹ State law is displaced only to the extent necessary to protect the federal interest in uniformity; there is still room for the application of state law when it will not impinge on the federal interest.¹¹² When no

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1055.

¹⁰⁷ *Id.* at 1053.

¹⁰⁸ Chicago Brief, *supra* note 69, at 32.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Grubart*, 115 S. Ct. at 1054.

¹¹² *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) (ex-

federal interest is implicated, courts are free to apply state law.¹¹³

The Supreme Court reviewed the circumstances leading up to the Chicago Flood and concluded that the incident fell within admiralty jurisdiction. It first considered the locality test and noted that Great Lakes had performed its activities in navigable waters. The Court also considered the application of the Admiralty Extension Act since the damage was consummated on land. Grubart and the City argued that this act did not confer jurisdiction over the claims because the damage was remote in both time and place from the situs of the wrongful conduct. They argued that to be within the Extension Act, "damage must be close in time and space to the activity that caused it: that it must occur 'reasonably contemporaneously' with the negligent conduct and no 'farther from navigable waters than the reach of the vessel, its appurtenances and cargo.'"¹¹⁴ The Court, however, refused to impose any remoteness test, stating that the plain language of the statute implied a requirement of proximate causation sufficient to "eliminate[] the bizarre."¹¹⁵ Use of a proximate causation test would "obviate not only the complication but even the need for further temporal or spatial limitations."¹¹⁶ Because the damage was caused by a vessel on navigable waters, the locality prong of the jurisdictional test was satisfied.¹¹⁷

The Supreme Court then reviewed the two parts of *Sisson's* maritime nexus test. It first analyzed the incident to determine whether it had a potential to disrupt maritime commerce.¹¹⁸ Grubart and the City each argued for a narrow interpretation of the incident. The City, for example, claimed that the incident could only be accurately identified as "the flooding of building basements in a downtown business district."¹¹⁹ The Court de-

plaining that state law is only required to yield to maritime law if conflict exists).

¹¹³ *Grubart*, 115 S. Ct. at 1054 (citing *Romero*, 358 U.S. at 373).

¹¹⁴ *Grubart*, 115 S. Ct. at 1049.

¹¹⁵ *Id.* at 1049-50.

¹¹⁶ *Id.* at 1050.

¹¹⁷ *Id.* at 1049. The petitioners did not contest the Seventh Circuit's finding that the barges used in the construction work were "vessels." *Id.* at 1049.

¹¹⁸ *Id.* at 1050.

¹¹⁹ Chicago Brief, *supra* note 69, at 47.

clined to construe the case that narrowly, however, and held that “the ‘general features’ of the incident at issue here may be described as damage by a vessel in navigable water to an underwater structure.”¹²⁰ It then found that there was little doubt that the incident posed a potential to disrupt maritime commerce because such damage could result either in the diversion of the watercourse or in restrictions on river traffic during repairs.¹²¹

The Court also found that Great Lakes’s activities had a substantial relationship to traditional maritime activity.¹²² Here, too, the petitioners argued for a narrow characterization of the activity at issue. Grubart argued that “Great Lakes’[s] general activity was bridge construction or bridge maintenance,”¹²³ while the City claimed that the activity that gave rise to the Flood was “the manner in which the tunnel had been operated and maintained.”¹²⁴ The Supreme Court held instead that Great Lakes’s pile-driving activity was more appropriately described as “repair or maintenance work on a navigable waterway performed from a vessel.”¹²⁵ So characterized, the Court found that this activity had a substantial relationship to maritime commerce because courts have long held that such work is maritime in nature.¹²⁶ As a result of the foregoing analysis, the Supreme Court sustained the assertion of admiralty jurisdiction over the Chicago Flood case.

¹²⁰ *Grubart*, 115 S. Ct. at 1051.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Grubart Brief, *supra* note 93, at 20.

¹²⁴ Chicago Brief, *supra* note 69, at 48.

¹²⁵ *Grubart*, 115 S. Ct. at 1051.

¹²⁶ *Id.*; see also *Shea v. Rev-Lyn Contracting Co.*, 868 F.2d 515, 518 (1st Cir. 1989) (finding that bridge repair performed by crane-carrying barge was maritime in nature); *Nelson v. United States*, 639 F.2d 469, 472 (9th Cir. 1980) (holding that repair of wave suppressor from barge was maritime in nature); *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932) (impliedly finding that pile driving from crane-carrying barge in connection with dock construction was maritime in nature).

The *Grubart* Court additionally noted that, even if the City’s failure to properly maintain the tunnel was partly responsible for the damage, admiralty jurisdiction would still be appropriate because *Sisson* does not require that all of the tortfeasors be involved in maritime activity for jurisdiction to attach. All that is required is that one tortfeasor be engaged in maritime activity and that such activity be cited as a proximate cause of the damage. *Grubart*, 115 S. Ct. at 1052.

III. THE AFTERMATH: CONFUSION AND DEBRIS

A. *Post-Grubart Shortcomings of the Nexus Test*

In spite of its exertions, the Supreme Court has once again failed to clearly define the scope of admiralty jurisdiction over tort. Although the *Grubart* Court recited the three-part *Sisson* test in a way that implies clarity, the Court still seems to be struggling with the meaning of the nexus test. While it is true that *Grubart* addressed some minor points of uncertainty,¹²⁷ and seemingly ended the multifactor *Kelly* analysis, the result is still that admiralty jurisdiction over tort depends on a court's ability to characterize both the incident and activity with the requisite amount of generality. Courts then must also determine whether the incident has a potentially disruptive impact on maritime commerce and whether the activity bears a substantial relationship to traditional maritime activity.

The cases since *Sisson* provide ample evidence that the nexus test works relatively easily only in those cases in which there is little dispute that admiralty jurisdiction exists in the first place. Thus, when vessels have collided or passengers have been injured, jurisdiction under *Sisson's* nexus test is practically assumed. However, these were exactly the types of cases that would most likely have been within admiralty jurisdiction under the strict locality test. In cases at the margins, on the other hand, the *Sisson* nexus test seems not to provide any more satisfactory results than the locality rule.

The development of the nexus test perhaps resulted from a concern that, under the locality rule, federal courts would be inundated with cases arising from non-traditional forms of waterborne activity,¹²⁸ particularly with cases involving pleasure boats. Applying *Executive Jet's* nexus requirement to maritime activity

¹²⁷ The *Sisson* opinion did not discuss the locality requirement, leading some lower courts to wonder whether locality was still a prerequisite to jurisdiction. The *Grubart* Court clarified this issue by explicitly holding that, after *Sisson*, the locality requirement must be satisfied for admiralty jurisdiction to attach. *Grubart*, 115 S. Ct. at 1048.

¹²⁸ See, e.g., *Peytavin v Government Employees Ins. Co.*, 453 F.2d 1121 (5th Cir. 1972) (denying admiralty jurisdiction over personal injury claim arising from automobile collision on floating pontoon).

seems, therefore, to have been an unwarranted expansion of the holding in that case.¹²⁹

The different interpretations lower courts gave the *Foremost* test should have been a warning to the Supreme Court that the jurisdictional inquiry was breaking down. The refinement attempted by the Supreme Court in *Sisson* did not really go to the difficulties of the nexus test; instead, it merely compounded the problem by doubling the opportunities for lower courts to engage in policy analysis.¹³⁰ Faced with the prospect of defining the incident and the activity in particular cases, some lower courts simply opted instead to utilize the multifactor tests they had used before *Sisson*.¹³¹ This was true even in situations in which *Sisson* itself stated that multifactor tests were inappropriate.

The first problem with the *Sisson* nexus test, even as “clarified” by *Grubart*, is that no one seems to be able to discern the appropriate level of generality required to complete the analysis. In *Grubart*, the Supreme Court asserted that the *Sisson* analysis turns “on a description of the incident at an intermediate level of possible generality.”¹³² Relying on this statement, the Court found that the general features of the incident were best “described as damage by a vessel in navigable water to an underground structure.”¹³³ The Court gives the impression that its characterization was self-evident and forecloses all other possibilities. But, why, for instance, could the incident not be appropriately described as “damage to a freight tunnel caused during bridge repair”? Why is it not better characterized as “flooding of buildings caused by improper maintenance of an underwater tunnel”? What is it about the latter two descriptions that makes

¹²⁹ *Sisson*, 497 U.S. at 369-70 (Scalia, J., concurring).

¹³⁰ After *Sisson*, one commentator questioned whether courts would not adopt multifactor tests for both of the parts of the nexus test. Jerome C. Scowcroft, *Admiralty Jurisdiction — Pleasure Craft*, 22 J. MAR. L. & COM. 299, 305 (1991).

¹³¹ See, e.g., *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1260-63 (9th Cir. 1993) (applying modified four-factor test in addition to *Sisson* approach); *Price v. Price*, 929 F.2d 131, 135-36 (4th Cir. 1991) (considering general character of allegations while also applying *Sisson* approach); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991) (applying *Sisson* approach and citing *Kelly* factors as relevant to determination of whether activity may be categorized as traditionally maritime).

¹³² *Grubart*, 115 S. Ct. at 1051.

¹³³ *Id.*

them broader or narrower “levels of possible generality” than the one chosen by the Supreme Court? Justice Thomas summed up the problem quite succinctly:

The majority does not explain the origins of “levels of generality,” nor, to my knowledge, do we employ such a concept in other areas of jurisdiction. We do not use “levels of generality” to characterize residency or amount in controversy for diversity purposes, or to determine the presence of a federal question. Nor does the majority explain why an “intermediate” level of generality is appropriate. It is even unclear what an intermediate level of generality is, and we cannot expect that district courts will apply such a concept uniformly in similar cases.¹³⁴

Similarly, in determining whether the activity in *Grubart* had a substantial relationship to traditional maritime commerce, the Court found that the activity was best described as “repair or maintenance work on a navigable waterway performed from a vessel.”¹³⁵ Why was it not “bridge maintenance,” “pile driving,” or even “construction”? Certainly one could argue that “pile driving” is too narrow and that “construction” is too general, but how is one to know?

The confusion rampant in the lower courts as to the appropriate level of generality can be seen in several decisions rendered shortly after *Sisson*.¹³⁶ The Ninth Circuit, in particular, in a case involving a man who was injured when he dove from a small boat into shallow water, quite ably demonstrated the way in which the nexus test might be manipulated. In *Delta Country Ventures, Inc. v. Magana*,¹³⁷ the majority characterized the activity as “aquatic recreation off a pleasure boat” and refused to extend admiralty jurisdiction to the claim. The dissent, however,

¹³⁴ *Id.* at 1057-58 (Thomas, J., concurring).

¹³⁵ *Id.* at 1051.

¹³⁶ Compare *Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987) (holding admiralty jurisdiction did not attach to claim by swimmer injured while diving from boat into shallow water) with *In re Bird*, 794 F. Supp. 575 (D.S.C. 1992) (finding admiralty jurisdiction over claim brought by person injured after being pushed from small boat into shallow water). Compare also *Kunreuther v. Outboard Marine Corp.*, 715 F. Supp. 1304 (E.D. Pa. 1989) (finding no admiralty jurisdiction over products liability action brought by injured diver against manufacturer of boat engine) with *Windsor Mt. Joy Mut. Ins. Co. v. Brunswick Corp.*, 1992 AMC 1114 (D.N.J. 1991) (holding admiralty jurisdiction applied to claim of water skier injured by defective motorboat engine).

¹³⁷ 986 F.2d 1260 (9th Cir. 1993).

argued that the majority had deliberately defeated admiralty jurisdiction by characterizing the activity in the most fact-specific way possible and in "nomenclature so stilted it could appear only in a judicial opinion."¹³⁸ It stated:

[B]y focusing on the minutiae of the incident, rather than the "general conduct from which the incident arose," the majority ignores what the Court actually did in *Sisson*: [i]t defined the relevant activity as the "storage and maintenance of a vessel at a marina on navigable waters," not as doing the laundry or as installing and maintaining household appliances. In addition, the Court cited with approval *Executive Jet Aviation, Inc. v. [City of] Cleveland*, where the "relevant activity was not a plane sinking in Lake Erie, but air travel generally." *Sisson* also explained that in *Foremost Ins. Co. v. Richardson*, . . . the "relevant activity [was] navigation of vessels generally."¹³⁹

The dissent here correctly identified the problem with the *Sisson* interpretation of the nexus test: without clear rules, courts have too much latitude in defining the scope of the relevant activity. In *Delta Country Ventures*, the majority was apparently concerned that finding admiralty jurisdiction would allow the owner to invoke the provisions of the Limitation Act. Thus, it defined the activity narrowly to keep admiralty jurisdiction from attaching and to allow the plaintiff, a fifteen-year-old boy who was diagnosed as a quadriplegic following the accident, to pursue common law remedies.¹⁴⁰ In other cases, similar results would be easy to obtain.¹⁴¹

A major problem with the nexus test, therefore, is that a call to focus on general, rather than specific, conduct does not give any indication about the level of generality implicated. What does it mean to be "too specific"? Under the facts in *Delta Country Ventures*, a court could have legitimately characterized the activity as swimming and precluded admiralty jurisdiction from attaching; yet, it could also have characterized the activity as boating, thus perhaps bringing the claim within admiralty jurisdiction. In essence, then, the Supreme Court's abandonment of

¹³⁸ *Id.* at 1265 (Kozinski, J., dissenting).

¹³⁹ *Id.* (Kozinski, J., dissenting) (citations omitted).

¹⁴⁰ *Id.* at 1264 (Kozinski, J., dissenting).

¹⁴¹ *Id.* at 1265 (Kozinski, J., dissenting).

the locality test in favor of a test that requires courts to determine the general conduct from which an activity arises actually results in greater confusion and absurdity. Decisions about jurisdiction, which ought to be somewhat straightforward, become more complex and result in courts making determinations about the merits of the claim in the jurisdictional inquiry.

A second problem with the jurisdictional analysis now demanded by *Sisson* and *Grubart* is that it still requires courts to engage in a balancing test only slightly less complicated than the multifactor analysis of *Kelly*. Now, instead of attempting to apply "traditional concepts of the role of admiralty law,"¹⁴² courts must divine whether an incident, once characterized, has a potentially disruptive impact on maritime commerce. Having successfully prophesied whether a potential disruption is present, courts are then faced with trying to determine whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity.¹⁴³ The Supreme Court has given no guidance to assist lower courts in deciding how disruptive an impact must be, or how great the probability of disruption must be, to satisfy the first prong of the nexus test. Similarly, even if the phrase "traditional maritime activity" was capable of definition, neither *Grubart* nor *Sisson* gives any hint as to how close a particular activity must be to have a substantial relationship to it.

The difficulties inherent in the Supreme Court's nexus test are made obvious by the fact that the Court has had to revisit the jurisdictional question three times in just over ten years.¹⁴⁴ In *Foremost*, it had to determine whether non-commercial vessels are included in admiralty. In *Sisson*, it sought to address lingering questions about whether a navigational error is a prerequisite to jurisdiction when non-commercial vessels are involved. In *Grubart*, it sought once again to put an end to the multifactor analysis of admiralty jurisdiction. As a result, the Supreme Court seems to be functioning much like a trial court, resolving discrete issues that ought to be able to be clearly resolved at the outset of the litigation.

¹⁴² *Kelly*, 485 F.2d at 525.

¹⁴³ *Grubart*, 115 S. Ct. at 1048; *Sisson*, 497 U.S. at 373-74.

¹⁴⁴ *Grubart*, 115 S. Ct. at 1056 (Thomas, J., concurring).

The results of this type of jurisprudence are unsatisfactory in at least two ways. First, the flexibility of the *Sisson* nexus test invites countless appeals as parties disgruntled by trial courts' determinations of the appropriate level of generality repeatedly appeal what ought to be a rather basic question: whether federal courts have jurisdiction to even hear their cases. Secondly, the vagueness of the nexus test results in a great deal of uncertainty on the part of those engaged in maritime activities. While one could argue that the nexus test does not significantly alter the chances that traditional torts will fall within admiralty jurisdiction, it must certainly have been surprising for Great Lakes, a major maritime contractor and vessel owner, to have a trial court rule that its activities could not be considered traditional maritime activity.¹⁴⁵

B. A Return to The Plymouth?

As a result, it may be time to jettison the two-part nexus test entirely and return to the traditional locality rule. This is the position advanced by both Justice Thomas in *Grubart* and Justice Scalia in *Sisson*.¹⁴⁶ The nexus test has thus far proven to be far too ambiguous for consistent application by the lower courts. A return to the rule of *The Plymouth* may now, therefore, be in order.

For federal courts to assume jurisdiction in admiralty over a tort, they should require that both the substance and consummation of the tort to take place on water.¹⁴⁷ When damage is sustained on land, the Extension Act applies to bring that tort within admiralty jurisdiction as well. Thus, most of the cases one normally thinks of as being in admiralty, such as collisions or personal injuries suffered aboard vessels, would be in admiralty because they take place on navigable waters. Cases in which the

¹⁴⁵ *In re* Great Lakes Dredge & Dock Co., No. 92-C6754, 1993 U.S. Dist. LEXIS 16256, at *26 (N.D. Ill. Feb. 18, 1993), *rev'd sub nom.* Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993), *and aff'd sub nom.* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995).

¹⁴⁶ *Grubart*, 115 S. Ct. at 1058 (Thomas, J., concurring); *Sisson*, 497 U.S. at 374 (Scalia, J., concurring).

¹⁴⁷ *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865); *see also* Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316, 319 (1908) (stating that substance and consummation of wrong must take place on water to be within admiralty jurisdiction).

damage was done to a shore structure would have admiralty jurisdiction extended to them by virtue of the Extension Act. Indeed, the incidents in *Foremost*, *Sisson*, and *Grubart* would all have resulted in the exercise of admiralty jurisdiction under this rule. While a few unusual cases might thus fall within admiralty jurisdiction, such as libel published exclusively aboard a ship,¹⁴⁸ the alternative solution of having lower courts repeatedly revisit the jurisdictional issue seems less satisfactory. Moreover, the resources devoted to litigating the odd case “‘will be saved many times over by a clear jurisdictional rule that makes it unnecessary to decide’ what is a traditional maritime activity and what poses a threat to maritime commerce.”¹⁴⁹ The end result would be a simplified jurisdictional inquiry that enables litigants and judges to determine the appropriateness of admiralty jurisdiction at the outset of the case.

Two primary reservations are raised against such a simplified test. The first is that a locality rule would have the effect of inundating the federal courts with a flood of cases bearing little connection to traditional *commercial* maritime activity. This argument has been made repeatedly in the years since pleasure craft became more readily available. Lower courts used this argument to preclude jurisdiction over pleasure craft before *Foremost*,¹⁵⁰ and it is still reflected in federal court opinions after *Sisson*.¹⁵¹

The most common justification given for the above view is that admiralty jurisdiction was created to protect commercial activity.¹⁵² However, as the Supreme Court itself noted, the “federal interest in protecting maritime commerce cannot be

¹⁴⁸ Charles M. Hough, *Admiralty Jurisdiction — Of Late Years*, 37 HARV. L. REV. 529, 531 (1924).

¹⁴⁹ *Grubart*, 115 S. Ct. at 1058 (Thomas, J., concurring) (quoting *Sisson*, 497 U.S. at 374-75 (Scalia, J., concurring)).

¹⁵⁰ See *supra* note 128 and accompanying text (discussing concern that courts would be inundated with cases involving non-traditional waterborne activities under locality rule).

¹⁵¹ See, e.g., *Sinclair v. Soniform, Inc.*, No. CIV.A.89-5675, 1990 WL 172694 (E.D. Pa. Nov. 2, 1990), *rev'd on other grounds*, 935 F.2d 599 (3d Cir. 1991).

¹⁵² The view that admiralty jurisdiction was created to protect commercial activity, although widely stated, has recently been criticized as inaccurate. See William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 118 (1993) (stating that no evidence exists that eighteenth century Americans were concerned about need for national “admiralty jurisdiction over private civil litigation”).

adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity.”¹⁵³ Thus, federal courts should be able to take jurisdiction over cases involving non-commercial activity as a way of assisting in the preservation of the uniformity of maritime law. This is not to say, however, that such jurisdiction need be exclusive. State courts also have jurisdiction to enforce federal maritime law. Additionally, as shown below, the assertion of jurisdiction by federal courts over maritime cases does not necessarily mean the total displacement of state law when the application of state law is otherwise appropriate.

The second objection to the locality rule argues that allowing federal courts to take jurisdiction over all torts caused by or occurring on vessels violates principles of federalism. This objection is based on the theory that the assertion of jurisdiction by a federal court displaces state law because “[i]f a case is capable of being brought in federal court under that court’s admiralty jurisdiction, the rights and liabilities of the parties are governed by maritime law.”¹⁵⁴

Uniformity of law has long been one of the hallmarks of admiralty jurisprudence. Justice Bradley stated the reasons for this uniformity in *The Lottawanna*:¹⁵⁵

One thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character¹⁵⁶

¹⁵³ *Foremost*, 457 U.S. at 674-75.

¹⁵⁴ STEVEN F. FRIEDEL, 1 BENEDICT ON ADMIRALTY § 114 (7th ed. 1994). *See also* *Foremost*, 457 U.S. at 685 (Powell, J., dissenting) (noting that expanding federal admiralty jurisdiction requires application of federal admiralty law, which will pre-empt state tort law); Stolz, *supra* note 43, at 665 (stating that, if Supreme Court’s language is taken seriously, state laws inconsistent with admiralty law are void for interfering with admiralty law’s uniformity).

¹⁵⁵ 88 U.S. (21 Wall.) 558 (1875).

¹⁵⁶ *Id.* at 575.

Relying on this principle, the Supreme Court has repeatedly invalidated state actions that have threatened the development of uniformity in maritime law.¹⁵⁷

However, the requirement of uniformity in maritime law has not always been absolute. The Supreme Court has recognized that general maritime law may be changed or modified by state legislation,¹⁵⁸ even though the extent of state power to effect such changes has always been something of a question. Indeed, the Court itself recently noted that “[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in [its] admiralty jurisprudence, or indeed is even entirely consistent within [that] admiralty jurisprudence.”¹⁵⁹ State law is thus not totally displaced by the assertion of admiralty jurisdiction. States can legislate on matters relating to maritime activity even if the outlines of state power in this area are not totally clear. State-created liens on vessels, state statutes providing for survivors’ actions, and state laws governing marine insurance are all instances in which the Supreme Court has permitted the states to supplement or alter the general maritime law.¹⁶⁰

It follows, therefore, that a return to the locality rule will not unnecessarily infringe on the states’ right to apply their own law to maritime torts. When the federal interest in uniformity is not at issue, a state or federal court should apply state law. But when “the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce,” it should be disregarded.¹⁶¹

The real problem lies in the use of subject matter jurisdiction to determine choice of law. Under the *Kelly* factors, federal judges concerned that a case may not have a significant connec-

¹⁵⁷ See, e.g., *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (disallowing application of state workers’ compensation statutes to injuries covered by admiralty law); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (disallowing state requirement that maritime contract be in writing when maritime law regards oral contracts as valid).

¹⁵⁸ *Southern Pac.*, 244 U.S. at 216.

¹⁵⁹ *American Dredging Co. v. Miller*, 114 S. Ct. 981, 987 (1994). In *American Dredging*, the Court held that state forum non conveniens doctrines may also be applied in admiralty. *Id.*

¹⁶⁰ See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) (citing instances in which states have authority to legislate regarding maritime affairs).

¹⁶¹ *American Dredging*, 114 S. Ct. at 990 (Souter, J., concurring).

tion to traditional maritime activity frequently used the nexus test to prevent admiralty jurisdiction from attaching so that the case could proceed in state court under state law. *Grubart* does not necessarily alter this fact because, although the four-factor test is gone, a court could achieve the same objectives by simply choosing a level of generality in characterizing an activity that completely eliminates any hint of maritime connection.¹⁶²

The solution to the problem involves having federal courts make more of a distinction between subject matter jurisdiction and choice of law. The result would be a two-step analysis. Courts would first determine whether federal admiralty jurisdiction over the tort is appropriate under the locality test. If the case falls within admiralty jurisdiction, the court should next determine which issues involve the federal interest in uniformity and which are susceptible to being decided according to state law principles. Courts could then proceed to a trial of the case confident that they have not damaged the principles of federalism.¹⁶³

No doubt some will argue that the nexus test is necessary to ensure that only cases having a truly maritime flavor are adjudicated in the federal courts. Admiralty jurisdiction over torts should, some say, be determined on the same basis as that over contract, where courts have adopted a subject-matter test to determine whether a contract is within admiralty. This test holds that admiralty jurisdiction extends "over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea."¹⁶⁴ The test is divorced from locality and has the apparent advantage of limiting contract jurisdiction exclusively to those matters which relate to maritime commerce.

Yet, the subject-matter test for contract is really no more concrete than the nexus test for torts. Indeed, one could argue that

¹⁶² See, e.g., *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993).

¹⁶³ This analysis is taken in large part from that proposed by Professor Joseph Smith. See Joseph F. Smith, Jr., *Choice of Law Analysis: The Solution to the Admiralty Jurisdictional Dilemma*, 14 TUL. MAR. L.J. 1, 37 (1989) (proposing two-step test for application of substantive law in admiralty cases).

¹⁶⁴ *DeLovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776) (Story, J., on circuit); see also *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870) (holding maritime insurance contract to be within admiralty jurisdiction).

the subject matter test for contract has proved to be as difficult to apply and predict as the nexus test for torts. Thus, a contract to repair a vessel is maritime,¹⁶⁵ while a contract to build one is not.¹⁶⁶ A contract to fumigate a vessel is maritime,¹⁶⁷ but a contract to sell one is not.¹⁶⁸ A contract to insure a vessel is maritime,¹⁶⁹ but a contract to procure insurance is not.¹⁷⁰ As Professor Black once noted:

The attempt to project some "principle" is best left alone. There is about as much "principle" as there is in a list of irregular verbs. Fortunately, the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided.¹⁷¹

In reality, the subject-matter test for contract has worked only because types of contracts are relatively limited and courts have had many opportunities to decide the close cases. There is no reason to assume, therefore, that a nexus test, which is really a subject-matter test in disguise, will be useful in determining the scope of admiralty jurisdiction over tort. Unless courts are willing to engage in a long trek to determine the outlines of jurisdiction for the innumerable fact patterns bound to arise, as they have done for contract, the *Sisson* nexus test is best abandoned before matters become hopelessly confused.

CONCLUSION

The two-part nexus test for admiralty jurisdiction over tort, as clarified in *Grubart*, will prove to be no more satisfactory than the multifactor tests that went before. The desire to retain the nexus requirement is based on the false hope that courts will develop some coherent theme in the cases which will enable litigants and lawyers to predict whether a particular case falls within admiralty jurisdiction. In reality, however, the nexus test

¹⁶⁵ *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96 (1922).

¹⁶⁶ *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242 (1920).

¹⁶⁷ *Luckenback S.S. Co. v. Ruddy Fumigant Co.*, 11 F. Supp. 390 (W.D. Wash. 1935).

¹⁶⁸ *The Ada*, 250 F. 194 (2d Cir. 1918).

¹⁶⁹ *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870).

¹⁷⁰ *Marquardt v. French*, 53 F. 603 (S.D.N.Y. 1893).

¹⁷¹ Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950).

will prove to be as confused and arbitrary as any of the multifactor tests that went before. As a result, the Supreme Court should call a halt to the experiment and return to the rule of *The Plymouth*, making locality alone the test for jurisdiction over maritime tort. This test will not only provide predictability, but, when combined with a more realistic approach to choice of law questions, it will better protect the rights of the states to apply their own law in appropriate circumstances.