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# Of Incidents, Activities, and Maritime Jurisdiction: A Jurisprudential Exegesis

Thomas C. Galligan, Jr.\*

The Bible says that in the beginning, God created the heavens and the earth, and water covered the earth. Back then, one can imagine that whenever a tort occurred on the water<sup>1</sup> there was maritime jurisdiction over the claim. Then, after God created dry land,<sup>2</sup> there were torts everywhere; consequently, jurisdictional dilemmas developed. The traditional solution simply provided that if the tort occurred on navigable water there was admiralty jurisdiction, and if the tort did not occur on navigable water there was no maritime jurisdiction.<sup>3</sup>

Of course, as things developed, maritime jurisdiction meant not only that a federal court sitting in admiralty had the power to *hear* the case but also that federal, substantive, maritime law governed,<sup>4</sup> unless, of course, the maritime but local doctrine applied.<sup>5</sup> In that case, state law could apply, not of its own force but as borrowed federal law.

In any event, when determining whether maritime tort jurisdiction existed, locality was the critical factor. However, the locality test for jurisdiction led to some odd problems. For instance, if someone fired a shot from the land to the water, hitting someone on a vessel, there was admiralty jurisdiction. In that case, the tort occurred on the water for the damage occurred on the water, and a tort cannot really be said to have occurred until all elements of the cause of action have accrued: fault, cause, and damage. However, if someone fired a shot from a vessel on the water to the land and hit someone on land, there was no jurisdiction. In that case, no tort occurred on the water because the important element of damage had occurred on the land and not on the water.

More practically, where no shooting was involved, a simple locality test for jurisdiction led to problems where a vessel negligently allided with an "extension

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1. I am making the simplifying assumption that torts did indeed occur on the water during this period. I claim no such knowledge and have found no cases discussing the issue.

2. Many may be troubled by the hypothetical sequence of events set forth in the text. How could there be torts before there were dry land and people? This is a troublesome point which space limitations compel I pass over in this piece.

3. *The Plymouth*, 70 U.S. (3 Wall.) 20, 34 (1865).

4. *See Southern Pac. Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917).

5. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955); *Mayo v. Nissan Motor Corp.*, 639 So. 2d 773 (La. App. 3d Cir.), *writ granted and remanded*, 644 So. 2d 661 (1994), *on remand*, 647 So. 2d 676 (La. App. 3d Cir. 1994), *writ denied*, 651 So. 2d 280, 281 (1995); Thomas C. Galligan, Jr. & Jean Paul P. Overton, *Recent United States Supreme Court Developments in Admiralty*, 55 La. L. Rev. 469 (1995). Now, the Court has authorized resort to state law in a case involving the death of a non-seafarer which occurred in territorial waters. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619 (1996).

of the land," such as a pier, bridge, or wharf. In such a case, because the tort culminated on land, there would be no jurisdiction. Alternatively, if the pier owner or bridge operator was at fault in causing the allision, the vessel owner's claim against the land-based defendant would be subject to maritime jurisdiction because the tort culminated on the water. These jurisdictional rules led to both substantive and procedural problems. Substantively, the common law generally treated contributory negligence as a bar to recovery. Thus, in the pier or bridge owner's suit against the vessel at common law, the pier or bridge owner's contributory negligence would bar recovery. But, the maritime law employed a divided damages rule under which a negligent plaintiff's recovery from a negligent defendant was halved and not barred. Thus, in the vessel owner's suit against the pier or bridge owner in admiralty, the vessel owner recovered half of its damages. Procedurally, there was no jury trial in admiralty. Thus, while the pier or bridge owner's common law claim against the vessel owner could be heard by a jury, the vessel owner's admiralty claim against the pier or bridge owner would be heard by an admiralty judge.

To deal with this somewhat anomalous state of affairs, Congress in 1948 passed the Admiralty Extension Act (AEA or the Act).<sup>6</sup> The Act provides that:

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

Thus, after 1948, locality was still the test for determining admiralty jurisdiction in tort cases but with jurisdiction also extending to cases where the tort commenced on water (still locality) but culminated on land. Thus, for instance, in *Gutierrez v. Waterman S.S. Corp.*,<sup>7</sup> maritime jurisdiction existed over a claim where a longshore worker fell on spilled coffee beans on a pier. The beans had spilled from a bag being unloaded from a vessel. The Court sustained jurisdiction over the longshore worker's claim under the AEA. In another case,<sup>8</sup> the court sustained admiralty jurisdiction over a claim arising out of a car wreck between two passengers who had shortly before disembarked from a "booze cruise." One passenger alleged that the other caused him injury as a result of being served too much liquor on the vessel's advertised "booze cruise." Thus, a basic dram shop claim became a maritime tort claim as a result of the AEA.

But, was pure locality (plus extension) really the test even where the tort had nothing to do with navigable water other than the happenstance of where it "occurred"? Or, was more than locality required even on the water? The United States Supreme Court began its ongoing answer to this question in *Executive Jet*

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6. 46 U.S.C. app. § 740 (1994).

7. 373 U.S. 206, 83 S. Ct. 1185 (1963).

8. *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251 (8th Cir. 1980).

*Aviation, Inc. v. City of Cleveland*.<sup>9</sup> In *Executive Jet*, a flock of birds encountered an airplane on a domestic flight over Lake Erie. The plane crashed. The Court held that, even though the "locality" of the alleged tort was arguably maritime, there was no admiralty jurisdiction. Justice Stewart, writing for the Court said: "claims arising from airplane accidents are not cognizable in admiralty . . . [absent the wrong bearing] a significant *relationship to traditional maritime activity*."<sup>10</sup> Thus, in *Executive Jet* there was no admiralty jurisdiction over the case before the Court, but was the logic of the decision limited to airplane cases? To domestic flight cases? Or, did its "relationship to traditional maritime activity" language apply to, or impact upon, other cases as well?

The Court answered some of those questions ten years later in *Foremost Insurance Co. v. Richardson*.<sup>11</sup> In *Foremost Insurance*, the Court applied the traditional maritime activity test to a collision between two recreational vessels on the Amite River, finding maritime jurisdiction. Responding to the argument that pleasure boats had nothing to do with maritime commerce, the Court still found jurisdiction, relying, in part, upon

[t]he potential disruptive impact [upon maritime commerce] of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation . . . .<sup>12</sup>

Justice Marshall, who wrote for the majority, also stressed the need for uniform navigational rules.<sup>13</sup>

Thus, as Professor Frank Maraist has noted, after *Foremost Insurance*, every maritime tort case needed to have an admiralty "flavor" before a court would sustain admiralty jurisdiction.<sup>14</sup> But, how much flavor did a case have to have? Or, how were lower courts to give meaning to the "significant relationship to traditional maritime" activity language?

The United States Fifth Circuit Court of Appeals, the expositor of much significant maritime jurisprudence and the Circuit which deals with some of the trickiest maritime issues due to the oil and gas industry and the multipurpose vessels the industry uses, came up with a multi-factor test for jurisdiction after *Executive Jet*. In *Kelly v. Smith*,<sup>15</sup> the court articulated a four part test which consisted of: "[1] the functions and roles of the parties; [2] the types of vehicles and instrumentalities involved; [3] the causation and the type of injury; and [4] traditional concepts of the role of admiralty law."<sup>16</sup> Later, in *Molett v. Penrod*

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9. 409 U.S. 249, 93 S. Ct. 493 (1972).

10. *Id.* at 268, 93 S. Ct. at 504 (emphasis added).

11. 457 U.S. 668, 102 S. Ct. 2654 (1987).

12. *Id.* at 675, 102 S. Ct. at 2658.

13. *Id.* at 675-76, 102 S. Ct. at 2658-59.

14. Frank L. Maraist, Admiralty In a Nutshell 38 (1988).

15. 485 F.2d 520 (5th Cir. 1973).

16. *Id.* at 525.

*Drilling Co.*,<sup>17</sup> the Fifth Circuit added three more factors to the *Kelly* test: “[5] the impact of the event on maritime shipping and commerce; [6] the desirability of a uniform national rule to apply to such matters; and [7] the need for admiralty ‘expertise’ in the trial and decision of the case.”<sup>18</sup> While the *Kelly/Molett* factors seemed particularly appropriate in cases involving multipurpose, non-traditional maritime “vessels,” they were also relevant and rational to any maritime tort case. The fourth, sixth, and seventh factors were particularly relevant to the need for admiralty expertise and uniform maritime rules noted in *Foremost Insurance*.

However, rather than accept the *Kelly* factors, the Supreme Court, in *Sisson v. Ruby*,<sup>19</sup> took its own shot at giving more meaningful content to the significant relationship to a traditional maritime activity test. *Sisson* arose out of a fire, caused by a defective washer/dryer, aboard a pleasure boat docked at a marina, which burned the boat, other boats docked nearby, and the marina itself.<sup>20</sup> The owner of the first burning boat (the one with the bad washer/dryer) sought protection under the Limitation of Liability Act;<sup>21</sup> however, the claimants objected, arguing limitation was unavailable because there was no maritime jurisdiction. Not deciding whether the Limitation Act provided an independent basis for federal jurisdiction,<sup>22</sup> the Court found tort jurisdiction under the *Executive Jet/Foremost Insurance* test. Justice Marshall, again writing for the Court, elaborated: first, the “incident causing the harm, the burning of docked boats at a marina on navigable waters, was of a sort ‘likely to disrupt [maritime] commercial activity.’”<sup>23</sup> At this “incident” level of the analysis the Court said it must “assess the general features of the type of incident involved”<sup>24</sup> to decide if the incident has “a potentially disruptive impact on maritime commerce.”<sup>25</sup> Second, to sustain maritime jurisdiction, there must be a “‘substantial relationship’ with ‘traditional maritime activity’ in the kind of activity from which the incident arose, ‘the storage and maintenance of a vessel . . . on navigable waters.’”<sup>26</sup> At the activity level a court must decide if “the general charac-

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17. 826 F.2d 1419 (5th Cir. 1987), cert. denied sub nom. 493 U.S. 1003, 110 S. Ct. 563 (1989).

18. 826 F.2d at 1426.

19. 497 U.S. 358, 110 S. Ct. 2892 (1990).

20. *Id.* at 367, 110 S. Ct. at 2894.

21. 46 U.S.C. app. §§ 181-196 (1988).

22. See *Richardson v. Harmon*, 222 U.S. 96, 32 S. Ct. 27 (1911) (jurisdiction to limit liability existed where the underlying action giving rise to the claim was a nonmaritime tort). On a related issue, the Death on the High Seas Act, 46 U.S.C. app. § 761 *et seq.* (1988) may provide an independent basis for jurisdiction. See generally *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S. Ct. 35 (1995).

23. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1048 (1995) (quoting *Sisson*, 497 U.S. at 363, 110 S. Ct. at 2896).

24. *Sisson*, 497 U.S. at 363, 110 S. Ct. at 2896.

25. *Id.* at 364 n.2, 110 S. Ct. at 2896 n.2.

26. *Grubart*, 115 S. Ct. at 1048 (quoting *Sisson*, 497 U.S. at 365-67, 110 S. Ct. at 2897-98).

ter,"<sup>27</sup> of the "activity giving rise to the incident,"<sup>28</sup> reveals a "substantial relationship to traditional maritime activity."<sup>29</sup>

Thus, after *Sisson*, maritime tort jurisdiction was dependent upon: (1) location (under either the traditional location test or the Admiralty Extension Act) and (2) maritime flavor defined in reference to (a) the incident and its potential to disrupt maritime commerce and (b) the activity from which the incident arose and whether that activity bore a significant relationship to a traditional maritime activity. One will note the generality used to articulate both the incident and activity involved.

What did *Sisson* mean for the Fifth Circuit's *Kelly* factors? In a footnote in *Sisson*,<sup>30</sup> the Court said that at least in a case where all the involved instrumentalities were engaged in similar activities (mooring at a marina), it preferred its two part test for maritime flavor to a multi-factor test. Despite the footnote, the Fifth Circuit adhered to the *Kelly* factors when determining maritime jurisdiction after *Sisson*.<sup>31</sup>

Then came *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*<sup>32</sup> Great Lakes Dredge & Dock Company (Great Lakes) bid on a contract with the City of Chicago to replace pilings around several piers supporting bridges spanning the Chicago River. Great Lakes got the contract and carried out the work by using two barges and a tug. One barge carried pilings; the other carried a crane. After the work was complete, an eddy formed in the river near one of the repaired bridges. The eddy was caused by the collapsing walls or ceiling of a freight tunnel, maintained by the City of Chicago, which ran under the river. As the tunnel support collapsed, river water ran into the tunnel and hence to the basements of buildings in the Chicago Loop. While no one built any arks, the damage from the ensuing flood was serious. Many victims filed suit against Great Lakes and the City of Chicago in state court. The plaintiffs claimed Great Lakes had negligently weakened the tunnel structure which the City of Chicago had negligently maintained. Great Lakes responded boldly (and predictably) by filing a complaint in federal district court seeking to limit its liability and/or seeking contribution and indemnity from the City. The City (joined by Grubart, a flood victim and erstwhile state court plaintiff) filed a motion to dismiss the federal proceeding for lack of subject matter jurisdiction which the District Court granted. The Seventh Circuit reversed, finding maritime jurisdiction.<sup>33</sup> The U.S. Supreme Court granted certiorari and affirmed.<sup>34</sup> Justice Souter wrote the

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27. *Sisson*, 497 U.S. at 365, 110 S. Ct. at 2897.

28. *Id.* at 364, 110 S. Ct. at 2897.

29. *Id.* at 364 n.2, 110 S. Ct. at 2896 n.2.

30. *Id.* at 365-66 n.4, 110 S. Ct. at 2897-98 n.4. See also *id.* at 365 n.3, 110 S. Ct. at 2897 n.3.

31. See *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 885-86 (5th Cir. 1993).

32. 115 S. Ct. 1043 (1995).

33. *Great Lakes Dredge & Dock Co. v. Chicago*, 3 F.3d 225 (1993).

34. As in *Sisson*, the Court did not decide whether the Limitation Act provided an independent basis of jurisdiction. 115 S. Ct. at 1053.

majority opinion; Justice O'Connor concurred; and Justices Thomas and Scalia concurred in the judgment.

According to Justice Souter "the issue . . . [was] simply whether or not a federal admiralty court has jurisdiction over claims that Great Lakes's faulty replacement work caused the flood damage."<sup>35</sup> To answer the question, the Court first analyzed location. The tort was "done" on navigable waters. It was also "caused by a vessel."<sup>36</sup> Thus, under the AEA, location seemed satisfied. However, Grubart and the City sought to limit the reach of the AEA by requiring that:

the 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."<sup>37</sup>

The Court rejected that argument, noting that the AEA's phrase "caused by," should be interpreted to mean "proximate causation,"<sup>38</sup> a more familiar, and "less stringent" test than that proposed by Grubart and the City.

With locality out of the way, the Court next turned to the "maritime connection inquiries."<sup>39</sup> The first *Sisson* connection question required a "description of the incident at an intermediate level of possible generality."<sup>40</sup> The Court described the incident "as damages by a vessel on navigable water to an underwater structure."<sup>41</sup> So put, the "potentially disruptive impact on maritime commerce" was clear. Disruption of maritime commerce could occur on the water itself from damaging a structure or could occur from the damage leading to "restrictions on the navigational use of the waterway during required repairs."<sup>42</sup> Turning to the activity issue, the Court characterized the activity as "repair or maintenance work on a navigable waterway performed from a vessel."<sup>43</sup> Consequently, "[d]escribed in this way, there is no question that the activity is substantially related to traditional maritime activity, for barges and similar vessels have traditionally been engaged in repair work similar to what Great Lakes contracted to perform here."<sup>44</sup> On this point, the City had argued that the Court should focus on the City's "alleged failure at properly maintaining and operating the tunnel system . . . ."<sup>45</sup> In response, the Court pointed back

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35. 115 S. Ct. at 1047.

36. *Id.* at 1049.

37. *Id.* at 1049.

38. *Id.* at 1049.

39. *Id.* at 1050.

40. *Id.* at 1051.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1052.

to *Foremost Insurance* where it had said the wrong there “involves the negligent operation of a vessel on navigable waters. . . .”<sup>46</sup> In *Grubart*, the Court said:

By using the word “involves,” we made it clear that we need to look only to whether one of the arguably proximate causes of the incident originated in the maritime activity of a tortfeasor: as long as one of the putative tortfeasors was engaged in traditional maritime activity the allegedly wrongful activity will “involve” such traditional maritime activity and will meet the second nexus proxy. Thus . . . [t]he substantial relationship test is satisfied when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident.<sup>47</sup>

The Court next defended its incident/activity test against attacks regarding its susceptibility to abuse through over generalization. Petitioners had claimed that if the “activity” at issue in *Grubart* was maritime related, “virtually every activity involving a vessel on navigable waters” would be “a traditional maritime activity sufficient to invoke maritime jurisdiction.”<sup>48</sup> The Court did not consider that criticism “fatal,” noting that normally a tort involving a vessel on navigable water would fall within admiralty jurisdiction.

Importantly, the City had argued that in suits “involving land based parties and injuries,”<sup>49</sup> the Court should adopt a “totality of the circumstances” test for admiralty jurisdiction.<sup>50</sup> Noting the similarity between the City’s proposed test and the Fifth Circuit’s *Kelly* test, the Court was *not* persuaded. Importantly, the Court noted the “proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal.”<sup>51</sup>

Critically, one notes that the Court’s decision in *Grubart* implies that in a multiple, concurrent tortfeasor case where there is maritime jurisdiction over a maritime joint tortfeasor, there is *maritime* jurisdiction over the land based tortfeasor.

As noted, Justice O’Connor concurred. On the important multiple tortfeasor point, while she agreed with the Court’s decision, she did *not* read its opinion to mean that once a court found it had admiralty jurisdiction over a claim against a party, it *must* then exercise admiralty jurisdiction over *all* claims and parties.

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46. *Id.* (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S. Ct. 2654, 2658 (1982)).

47. *Grubart*, 115 S. Ct. at 1052.

48. *Id.* (quoting Brief for Petitioner *Grubart* at 6, *Grubart*, 115 S. Ct. 1043 (Nos. 93-762, 93-1094)). That was not a “fatal criticism.” *Id.*

49. *Id.* at 1053.

50. *Id.* (citing Brief for Petitioner City of Chicago at 32, *Grubart*, 115 S. Ct. 1043 (Nos. 93-762, 93-1094)).

51. *Grubart*, 115 S. Ct. at 1055.

"Rather, the court should engage in the usual supplemental jurisdiction and impleader inquiries."<sup>52</sup>

Justices Thomas and Scalia concurred in the judgment. Justice Thomas would jettison the *Sisson* test and "restore the jurisdictional inquiry to the simple question whether the tort occurred on a vessel on the navigable waters of the United States."<sup>53</sup>

So, after all, what does *Grubart* mean? Several basic points merit examination. First, the Court's painstaking analysis of maritime flavor in a case arising under the AEA means that a significant connection to maritime activity is required in an AEA case. Put differently, the AEA does not provide an independent basis of maritime jurisdiction. While the United States Fifth Circuit had required maritime flavor in AEA cases before *Grubart*,<sup>54</sup> the Supreme Court had never expressly so held. While *Grubart* does not per se state that maritime flavor is required in AEA cases, the simple fact is that *Grubart* is an AEA case, and the bulk of the Court's opinion expressly deals with the maritime flavor issue. Thus, one is neither reaching nor stretching to read *Grubart* to provide maritime flavor *is* required in an AEA case.

Sticking with the AEA for a second, the *Grubart* case establishes that the words "caused by" in the AEA mean "proximately caused by." While the words proximate cause defy meaningful definition, most tort lawyers know proximate cause when they see it, or at least they know trouble when they see it in the guise of a proximate cause issue. As the Court noted, in regards to "proximate cause" and AEA jurisdiction: "Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements."<sup>55</sup> So while the proximate cause issue may present significant substantive gyrations, it need not stifle decision at the jurisdictional level.

Second, in *Grubart* the Court expressly and clearly rejected a multi-factor test for admiralty jurisdiction. The Court in *Sisson* initially articulated the incident/activity test for maritime flavor. There, the Court refused to employ a multi-factor test, like the Fifth Circuit's *Kelly* factors, in a case where the relevant instrumentalities were engaged in similar activities. In *Grubart*, the Court flatly rejected multi-factor tests in a case where the relevant parties were engaged in different types of activities. Put simply, *Grubart* sounded the death knell for *Kelly*. Since *Grubart*, the Fifth Circuit, en banc, in *Coats v. Penrod Drilling Corp.*,<sup>56</sup> has also abandoned *Kelly*, applying the *Sisson/Grubart* incident/activity test.<sup>57</sup> Thus, *Sisson* lives, and debate about the appropriate

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52. *Id.* (O'Connor, J., concurring).

53. *Id.* (Thomas, J., concurring).

54. *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981).

55. *Grubart*, 115 S. Ct. at 1050.

56. 61 F.3d 1113 (5th Cir. 1995).

57. For another post-*Grubart* jurisdiction decision, see *White v. United States*, 53 F.3d 43 (4th

"levels of generality" on incidents and activities will heat up. Lawyers arguing jurisdiction in maritime cases will learn to manipulate their characterizations of the incident and activity to further their clients' interests. When water is in the air, it will be a rare case in which a party asserting maritime jurisdiction will not be able at least to make a colorable argument for jurisdiction based upon its characterization of the relevant incident and activity. No doubt jurisdiction decisions in particular cases will not be dramatically different; only the words will change, from *Kelly's* factors to incidents and activities.

Before moving on, note that all the Supreme Court opinions developing the maritime flavor tests have involved what we may call "vehicle" events. For instance, *Executive Jet* involved a plane crash; *Foremost Insurance* involved a collision between two vessels; *Sisson* involved a fire on a vessel; and *Grubart* involved "construction" vessels causing damage on land. It is easy to see how, in such cases, the Court would focus on maritime commerce when analyzing the relevant "incident," i.e., whether the incident has the potential to disrupt maritime commerce.

Traditionally, courts have said that one of the reasons for the creation and existence of maritime jurisdiction was the development, preservation, and protection of maritime commerce.<sup>58</sup> Thus, it is not surprising that the Court has been concerned, in developing its incident/activity test for maritime flavor, with the potential disruption of maritime commerce. Interestingly, the Court has not been concerned with actual disruption of maritime commerce but the potential for disruption. Thus, when one considers the potential disruption required at the incident level of the *Sisson/Grubart* test, one considers not the real world of the case before the court but a hypothetical universe potentially threatened by an incident *like* the one which actually occurred. Running through the facts of the four Supreme Court maritime flavor cases will illustrate how the incident prong of the jurisdictional test might be applied.

In *Executive Jet*, a plane crashed into Lake Erie. How would one describe the incident? Let's say a plane crash into domestic waters.<sup>59</sup> Would that have the potential to disrupt maritime commerce? "You better, you better, you bet!"<sup>60</sup> My God, the plane could have crashed into a vessel; or, it could have blocked some important navigable waterway for an extended period. Those potential, hypothetical events would disrupt commerce.

In *Foremost Insurance*, two pleasure vessels collided on the Amite River in our own, great state of Louisiana. A man was killed in the collision. What was the incident? Let's start by calling it a collision between two vessels on a navigable waterway. That's accurate but general. Certainly if a court articulates

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Cir. 1995) (jurisdiction over injury suffered when plaintiff hit her head falling from a gangway).

58. Cf. William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117 (1993).

59. Of course, we could just say a plane crash. But that would probably be too general because it would take out all reference to water.

60. The Who, *You Better, You Better, You Bet, on Face Dances* (MCA Records 1981).

the incident at that level of generality, the incident has the potential to disrupt maritime commerce. The vessels could have been commercial vessels; they could have been huge tankers. Of course, they weren't. But, hypothetically, they could have been. Now, even if we get more daring (as the Court itself seems to have done in *Foremost*) and define the incident as a collision between two recreational vessels on a navigable waterway, there is still the potential for a disruption of maritime commerce. You see, if the collision between the vessels blocked a navigable waterway or caused the cessation of commerce on a navigable waterway, maritime commerce could potentially be stopped, i.e., adversely affected. But, and I don't mean to be difficult here, what about the fact that the Amite is not one of your major American waterways? Well, if you go back and reread *Foremost Insurance*, you will see that the Amite's lack of commercial activity doesn't really matter. When you are dealing with hypothetical worlds, one concerns one's self not only with what might have happened but with where it might have happened; that is, one is not limited to where the event actually occurred. Even though the collision in *Foremost* occurred on the Amite River in Louisiana, the Court noted it could have occurred at the mouth of the St. Lawrence Seaway.<sup>61</sup> If it had, of course, there could be major disruption of maritime commerce. Potentially, no commerce from the Atlantic could have gotten to or from the Great Lakes. So, the impact of a collision between two recreational vessels on the Amite River in Louisiana could be felt all over the commercial world.<sup>62</sup>

How about *Sisson*? There, the incident was the burning of docked boats at a marina. Did such an event have the potential to disrupt maritime commerce? Well surely if the burning boat was a commercial vessel, there was real disruptive potential. But what if it wasn't? Well, even then, if the fire spread to commercial vessels or necessitated keeping commercial vessels in or out of the marina, there was still the potential to disrupt maritime commerce. But, what if there were no commercial vessels in the marina? Again, if the fire necessitated keeping vessels out of (or confined) in the relevant port, disruption would be possible. And, what if there were no commercial vessels in or approaching the relevant port? Then, the potential that the fire could have occurred somewhere else, where people were engaging in maritime commerce, would no doubt be enough to satisfy the incident prong of the maritime flavor test.

Turning to *Grubart*, the incident there was described by the Court as: damage to an underwater structure by a vessel on navigable waters. Did that have the potential to disrupt maritime commerce? Certainly, for if repair to the underwater structure necessitated shutting down a navigable waterway to

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61. One wonders why the Court took the hypothetical so far north. I mean if the collision had occurred in the Gulf of Mexico at the mouth of the Mississippi River, there would have been a potential disruption of maritime commerce. See *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903, 106 S. Ct. 3271 (1986).

62. One is left to wonder whether the Court will take a similarly broad view of a defendant's duty (or proximate cause) to an injured maritime plaintiff in a personal injury suit. It is doubtful.

maritime commerce, disruption would occur. In fact, that is exactly what happened in *Grubart* (finally a case where there was an actual disruption of maritime commerce). Pushed to the extreme, if the navigable waterway totally disappeared into the underwater structure, there would be no more navigable water on which to sustain maritime commerce. This would not be like parting the Red Sea; it would be totally draining it.

After this little sojourn down the memory lane of admiralty jurisdiction jurisprudence, albeit applying the maritime flavor incident test, I am left with the impression that almost any case involving a vehicle event will pass the incident prong of the test. But, let's move from crashing, colliding, burning, and damaging incidents to less DeMillian occurrences. What about a plain old personal injury case? Suppose someone (a guest or passenger) fell on an oil spot on the deck of a cruise ship on navigable waters. Would there be maritime jurisdiction over such a slip and fall case? In just such a case, the Supreme Court has held maritime law, and not the "land" law of the Restatement (Second) of Torts, applies.<sup>63</sup> But that was before *Sisson* and *Grubart*; what about now?

Clearly, under a pure locality test, there would be jurisdiction in our little hypothetical slip and fall case. But what about under the maritime flavor test after *Grubart*? What's the incident? How about a person slipping and falling on the deck of a vessel in navigable waters? Sounds good to me. Now, here's the rub; does the incident test have to have, as it has in the Supreme Court to date, the potential to disrupt maritime commerce? If it does, then can we really say that a slip and fall has the potential to disrupt maritime commerce? We could resort to a hypothetical world, as the Court has done in its post-*Foremost* jurisprudence. In slip and fall cases, we could imagine that so many people fell on the oil spot and were injured so seriously that there was no one left to steer the ship. Then we could imagine the unsteered ship colliding with an oil tanker (either at the mouth of the Mississippi or the St. Lawrence Seaway or even Puget Sound), shutting down maritime commerce. Or, we could imagine that even if only one person slipped and fell, that slipper's injuries might be so severe that a commercial vessel had to be diverted to save him or had to wait until helicopters came and brought the injured victim to a land-based hospital. Certainly, if any of these events occurred, they would have the potential to disrupt maritime commerce.<sup>64</sup>

What about a claim by a land based shipyard worker who has contracted asbestosis, allegedly from installing asbestos in ships? Several courts that have considered the issue have concluded they do not have maritime jurisdiction over such claims.<sup>65</sup> But, just for the sake of intellectual curiosity, what would the incident be? Contraction of illness or injury in the shipbuilding process? If so,

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63. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959).

64. *See, e.g., Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995).

65. *See, e.g., Eagle-Picher Indus., Inc. v. United States*, 846 F.2d 888 (3rd Cir.), *cert. denied*, 488 U.S. 965, 109 S. Ct. 490 (1988); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634 (5th Cir. 1985).

does that incident have the potential to disrupt maritime commerce? Yes, because if everyone building ships gets sick, there's no one to build ships, and there are no new vessels to engage in maritime commerce.

How about an injury to a worker on a fixed platform on the Outer Continental Shelf or on a platform in territorial waters? Courts have traditionally not found maritime jurisdiction over such cases; platforms are not vessels.<sup>66</sup> Additionally, the Outer Continental Shelf Lands Act<sup>67</sup> says state law applies where not inconsistent with applicable federal law, and state law applies on the platform in state water as well. But, now, what about under the maritime flavor test? Let's describe the incident as injury to a worker on a platform located over navigable waters. So described, is there a potential disruption of maritime commerce? Well, if the rescue effort reached some hypothetically epic level, there could be potential disruption of maritime commerce. And if the injury arose out of some horrible explosion and fire on the platform, disruption becomes not just a hypothetical possibility but a downright hypothetical probability.

Rather than go on, which would be hypothetically possible, let us stop to consider whether the incident test promises to accomplish anything. Or, more practically, does it promise to exclude any case from the reach of maritime jurisdiction? Arguably not. All of the actual cases discussed, as well as the hypotheticals, passed the incident test. Some disputes which have never been subject to maritime jurisdiction (the asbestosis claims and the platform injury claims) satisfy the incident test. Other claims, which have long been the subject of maritime jurisdiction (the slip and fall cases), pass the incident test, but they require hypothetical concerns at a level that approaches silliness. One way to solve the incident test's inability to seriously deal with the typical, but small, personal injury claim would be to say that the incident must *either* have the potential to disrupt maritime commerce or otherwise impact upon another traditional concern of admiralty, such as the rights of those injured on vessels.

Of course, problems still remain because the incident test doesn't seem to exclude any cases from jurisdiction. One way to solve this little dilemma would be to admit that if a prong of a jurisdictional test does not exclude any meaningful case from jurisdiction, maybe that prong of the test is unnecessary and should be done away with.

Evidently, given the breadth of the incident prong of the maritime flavor test, the "activity" inquiry—does the activity have a significant relationship to a traditional maritime activity—will bear the significant load in the jurisdiction determination. No doubt it would be simpler to adopt the views articulated by the concurring opinions in *Sisson* (Justice Scalia) and *Grubart* (Justice Thomas). Anytime there is a tort on a vessel on navigable waters there is maritime jurisdiction. The simplicity of the proposed jurisdictional rule is its appeal.

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66. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835 (1969).

67. 43 U.S.C. §§ 1331-1356 (1988).

Under the incident/activity test, the incident inquiry is potentially meaningless. Thus, the true question in determining maritime tort jurisdiction will be whether the activity at issue bears a significant relationship to a traditional maritime activity. Traditional maritime activities should be governed by uniform maritime rules. That was one of the justifications for sustaining maritime jurisdiction in *Foremost Insurance*. Anytime there is a tort on a vessel on navigable water the relevant activities will normally be related to some traditional maritime activities like navigation, mooring, or construction from a vessel. But what about torts that occur on vessels, like slips and falls? Most often if they arise out of the failure to maintain a vessel or the failure to provide a reasonably careful crew, one will say that those cases too arise out of traditional maritime activities. What about torts that occur on the water but not on a vessel, such as two surf boards colliding? Perhaps there, the court must examine the activity with more care; however, such cases should be rare, and one wonders whether a uniform rule is required or whether each state facing the problem of surf board collisions ought to be able to come up with its own rule.

Whatever might be said for simpler jurisdictional tests, we are left with the incident/activity test. Lawyers, courts, and commentators must seek to achieve intermediate levels of possible generality.<sup>68</sup>

Additionally, *Grubart* arguably says there is maritime jurisdiction over claims against land based, non-maritime tortfeasors where there is maritime jurisdiction over a maritime tortfeasor and the land based and maritime torts arise out of the same nucleus of operative facts. Those were the facts of *Grubart*; an alleged maritime tortfeasor (Great Lakes) concurred with an alleged land based tortfeasor (Chicago) to cause damage to others (flooded basement owners). Normally, one would expect that if there were maritime jurisdiction over a maritime tortfeasor, a federal court could exercise supplemental jurisdiction over a non-maritime tortfeasor.<sup>69</sup> But the language of *Grubart* goes even further. In rejecting a "totality of the circumstances,"<sup>70</sup> multi-factor test, the Court said:

Of course one could claim it to be odd that under *Sisson* a land-based party (or more than one) may be subject to admiralty jurisdiction, but it would appear no less odd under the city's test that a maritime tortfeasor in the most traditional mould might be subject to state common-law jurisdiction. Other things being equal, it is not evident why the first supposed anomaly is worse than the second. But other things are not even equal. As noted just above, Congress has already made the judgment in the Extension Act, that a land-based victim may

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68. Cries for return to a *pure* locality test will continue. See, e.g., Matthew Harrington, *After the Flood: Cleaning Up the Test for Admiralty Jurisdiction Over Tort*, 29 U.C. Davis L. Rev. 1 (1995).

69. I believe this is the way Justice O'Connor viewed the case. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995) (O'Connor, J., concurring).

70. *Id.* at 1053.

properly be subject to admiralty jurisdiction. Surely a land-based tortfeasor has no claim to supposedly more favorable treatment.<sup>71</sup>

Read the last two sentences again; don't they stand for the proposition that the land based tortfeasor is subject to maritime jurisdiction? That's what they say to me. What is the effect of that? Subjecting a claim to maritime jurisdiction means not only that a federal court can hear the case, it also means that the claim will be decided under the substantive law of admiralty. Substantive maritime law will apply to the claim. Does that mean that the obligations of the City of Chicago in regards to the operation of an underground (alright underwater too) tunnel are decided under rules applicable to vessels passing one another on navigable waters, or under the general maritime law? The inappropriateness of that happenstance is mitigated by the fact that an admiralty court may adopt, or borrow, state law where a uniform federal rule neither exists nor is necessary. As the Court said in *Grubart*:

Contrary to what the city suggests . . . exercise of federal admiralty jurisdiction does not result in automatic displacement of state law. . . . [T]he city's proposal to synchronize the jurisdictional enquiry with the test for determining the applicable substantive law would discard a fundamental feature of admiralty law, that federal admiralty courts sometimes do apply state law.<sup>72</sup>

So, the flooded basement owner's claims against the City might be decided under state law even though those claims would be decided by an admiralty judge.

Practically, if the claims are subject to admiralty jurisdiction and are heard in federal court and there is no basis for federal jurisdiction other than admiralty, the claims against the City would be decided by a judge. There would be no jury trial. Or, as in *Grubart*, the claims against the City might be decided by a federal judge in the larger context of a limitation proceeding. What if, in a case where maritime jurisdiction existed over maritime and land based defendants, there were a settlement between the plaintiff and the maritime defendant? If *Grubart* means what it says, there would still be maritime jurisdiction over the plaintiff's claims against the land based tortfeasor. But, it seems doubtful a federal court would retain admiralty jurisdiction over the case if there were adequate time before trial to prevent prejudice to the parties should the court dismiss the claim, sending it to state court. Federal judges would no doubt take the same tack they would employ in a supplemental jurisdiction case where the claims against a "federal" defendant were resolved and only claims against a non-diverse "state" law defendant remained.

In conclusion, *Grubart* is the latest in the Supreme Court's maritime flavor cases. It establishes that maritime flavor is required in an AEA case. It provides

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71. *Id.* at 1054.

72. *Id.*

that "caused by" in the AEA means proximately caused by. After *Grubart*, the *Kelly v. Smith* multi-factor jurisdiction test is dead. It is replaced by an incident/activity test. The first prong of the test may well be meaningless or, at the least, may lead to strained interpretations. The second prong alone may not affect much of anything, in terms of the reach of maritime jurisdiction. Lastly, *Grubart* literally calls for the exercise of maritime jurisdiction over land based tortfeasors in certain joint tortfeasor cases. But practically, that extension may mean little. In the end, one is left wondering whether maritime flavor has added much, if anything, except perhaps lawyers' fees, to the development of maritime jurisdiction. It's still probably true that anytime a tort occurs on the water there will be maritime tort jurisdiction. And anytime a tort begins on the water and ends on the land there will be maritime jurisdiction. Most often the flavor of such cases will be maritime however you articulate the test.

