The Hidden Shoals of Maritime Law: A Maritime Lawyer's Navigational Chart for Shoreside Counsel

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Introduction

OVER MANY CENTURIES (IN FACT, MILLENNIA), maritime law has developed, and in the United States, maritime law provides a complete legal system for all forms of maritime-related commerce and activities. This system includes special rules for jurisdiction, venue, procedure, and substantive law, and covers everything from contract disputes, vessel charters, cargo damage, vessel collisions, insurance coverage, and environmental and criminal law. For most attorneys, the chance of encountering any such issues or the need to understand maritime law is fairly remote. However, there are several areas of maritime law that many attorneys may well encounter in their shoreside practices, often with significant consequences.

This piece provides an overview of several of these areas of maritime law in the context of recreational boating and cruise line claims. Part I summarizes the controlling test for admiralty jurisdiction (the rules controlling when special maritime law applies). Part II illustrates how the controlling maritime law applies in recreational boating and cruise passenger personal injury cases, including important marine insurance coverage rules. Finally, Part III discusses two unique maritime law claims and defenses: in rem claims against vessels and the Limitation of Liability Act.

I. The Controlling Test for Admiralty Jurisdiction and When Maritime Law Applies

If there is one rule every lawyer should be able to identify and apply, it is the test for admiralty jurisdiction. If the result of this test is positive, maritime law will control all substantive issues, even in state court.

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This test will also provide subject matter jurisdiction to allow the case to be filed and litigated in federal court.

A. Admiralty Law Generally

Under admiralty jurisdiction, admiralty law would apply.[1] This law primarily exists in the "general maritime law" and in extensive statutory law found in Title 46 of the U.S. Code.[2] However, courts also look to ancient maritime codes, English common law, state statutory law, and trends in state courts to determine what the maritime law historically has been and what equity requires it should be in any given case.[3] There are also many state court opinions and statutes.[4] Although most maritime cases can be filed in state court, subject to state procedural rules, maritime law will control all substantive issues; this is known as the "'reverse-*Erie*' doctrine."[5]

B. The Controlling Test for Admiralty Jurisdiction in Tort Cases

The U.S. Supreme Court reaffirmed the validity of the controlling two-part test for admiralty jurisdiction in tort cases in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*.[6] One prong of the test is geographical, requiring an incident to occur on the "navigable waters" of the United States, and the other prong relates to the nature of the dispute, a connection to traditional maritime activities, and "'a potentially disruptive impact [on] maritime commerce. . . .'"[7]

1. The First Prong: Location

The first prong of this two-part test, the "location test," is easy enough to apply: The test requires that the case arise out of the operation of a "vessel"[8] and a tort on the "navigable waters," or an injury suffered on land but caused by a vessel on the "navigable waters."[9] "Navigable waters" are the

1. *See generally* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986).

2. *Id.* at 864–65. ("Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."); *see generally* 46 U.S.C.

3. *See, e.g.*, The Lottawanna, 88 U.S. 558, 574–75 (1874).

4. *See, e.g.*, CAL. HARB. & NAV. CODE.

5. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222–23 (1986).

6. 513 U.S. 527, 534 (1995).

7. *Id.* (quoting Sisson v. Ruby, 497 U.S. 358, 364 n.2 (1990)).

8. *Id.*; 1 U.S.C. § 3 (defining "vessel").

9. 46 U.S.C. § 30101(a) ("The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on

waters that may be used in interstate or international commerce. The Court set forth the classic definition of the "navigable waters of the United States" in the 1870 case *The Daniel Ball* to include waters that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries . . . ."[10]

2. The Second Prong: Traditional Maritime Activity and Potential Impact on Maritime Commerce

The "connection" prong may prove more nuanced, since it will "'assess the general features of the type incident involved' to determine whether the incident has 'a potentially disruptive impact on maritime commerce' . . . [and] 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[11]

While there is abundant case law addressing these factors of the connection test, there are few bright-line rules, and there is substantial flexibility for arguing the facts of a given case.[12] One such area includes, importantly, how the "activity" in question is identified. For example, is an injury while diving off a rented houseboat considered a swimming incident or part of the operation, charter, or navigation of a vessel?

C. Admiralty Jurisdiction over Contractual Disputes

In the case of contractual disputes, the maritime law lays out, category by category, which types of contracts trigger admiralty jurisdiction. Again, a finding of admiralty jurisdiction in contract cases gives rise to both federal subject matter jurisdiction, as well as the application of maritime law. Generally, however, a "maritime contract," which triggers admiralty jurisdiction, is one that concerns commerce of the sea or maritime employment.[13] Despite this seemingly clear test, there are some counterintuitive exceptions; for

navigable waters, even though the injury or damage is done or consummated on land.").

10. 77 U.S. 557, 557 (1870). Under this definition, the Pacific Ocean, the San Francisco Bay, the Sacramento Delta, and Lake Tahoe would constitute "navigable waters." Lake Shasta, on the other hand, would not. *See id.*

11. *Grubart*, 513 U.S. at 534 (quoting Sisson v. Ruby, 497 U.S. 358, 364 n.2 (1990)).

12. For a good secondary source on admiralty jurisdiction and maritime law, *see generally* CHARLES M. DAVIS, MARITIME LAW DESKBOOK (2016 ed. 2016).

13. *See* Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 15 (2004) (quoting Exxon Corp. v. Cent. Gulf Lines, Inc., 500 U.S. 603, 608 (1991)); *see also* The Genesee Chief, 53 U.S. 443, 443 (1851) ("But it rests upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States, when the Constitution was adopted."); *id.* at 448 ("If this law can be sustained, it is not perceived why Congress may not extend the jurisdiction of the federal courts to every case of contract or tort . . . .").

example, the rule that contracts for the building of a vessel are not maritime contracts.[14]

II. Maritime Rules That Can Make or Break a Recreational Boating or Cruise Case

The rules covering maritime activities related to recreational boating and passenger claims are far too numerous to address in this brief essay. However, the following important rules either arise by a finding of admiralty jurisdiction or serve as pitfalls for the unwary.

A. The Assumption of Risk Defense Does Not Apply in Admiralty Jurisdiction Cases

The bar against the assumption of risk in a case covered by admiralty jurisdiction is a particularly important maritime law rule; the doctrine of assumption of risk does not apply where admiralty jurisdiction has been established.[15] This can be of critical importance in a recreational boating case, particularly in California where the courts routinely apply the assumption of risk doctrine to injuries arising out of recreational activities.[16]

B. The Uniform Statute of Limitations Applicable to Maritime Torts

Another critical rule is that for all "maritime tort[s]," a uniform three-year statute of limitation applies in place of any applicable state statute of limitations (e.g., the California two-year statute of limitation for personal injury claims).[17] Be careful, however, as there are some notable exceptions to this rule, such as the standard one-year limitation period and six-month notice period included in most cruise line tickets[18] or the fact that maritime claims against the U.S. government or the state of California have their own

14. Kossick v. United Fruit Co., 365 U.S. 731, 735, 742 (1961) (citing People's Ferry Co. v. Beers, 61 U.S. 393 (1858)).

15. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 424–26, 433 (1939); Movible Offshore Co. v. Ousley, 346 F.2d 870, 873 (5th Cir. 1965).

16. *See, e.g.*, Whelihan v. Espinoza, 110 Cal. App. 4th 1566, 1566 (2003) (holding that California statutes addressing the safe operation of jet skis do not displace the application of primary assumption of risk to the sport of jet skiing); *see also* Truong v. Nguyen, 156 Cal. App. 4th 865, 865 (2007) (finding that the doctrine of assumption of risk applies to the claims of passengers on personal watercraft).

17. 46 U.S.C. § 30106; CAL. CIV. PROC. CODE § 335.1.

18. *See* 46 U.S.C. § 30508(b).

controlling statutes of limitations, administrative remedy exhaustion prerequisites, and claims presentation deadlines.[19]

C. Admiralty Law and Forum Selection Clauses: The Contract Controls

Another important maritime rule is the fact that forum selection clauses found in cruise tickets have also been held to be enforceable and require, for example, that all claims against Carnival Cruise Line be brought in Florida (even on a cruise departing San Francisco for Alaska, for instance).[20] Foreign arbitration (and forum selection) clauses in bills of lading (even for goods shipped to U.S. ports) are also enforceable.[21]

D. Admiralty Law, Joint and Several Liability, and Separate Settlements

A settlement with one of multiple tortfeasors also presents a trap for the unwary. Although there had been a split in the U.S. federal circuits on how a separate settlement should be treated under maritime law, the U.S. Supreme Court in 1994 settled the question and affirmed the applicability of the doctrine of joint and several liability in maritime cases.[22] *McDermott, Inc. v. AmCLYDE and River Don Castings, Ltd.* not only ruled that where there is a separate settlement, no credit will be given to the non-settling defendant(s), but also that any liability of the remaining defendant(s) will be reduced by the fault attributed to the settling defendant (by trying "the empty chair").[23] Critically, however, a separate settlement terminates joint and several liability, which can be a major issue if one has a weak liability case against a remaining defendant with deep pockets.[24]

19. *See, e.g.*, Suits in Admiralty Against the United States, 46 U.S.C. §§ 30901–18; Clarification Act, 46 C.F.R. § 327.8 (stating the requirement for the filing of administrative claims by seamen employed by MarAd); Smith v. United States, 873 F.2d 218, 219–20 (9th Cir. 1989) (citing 46 U.S.C.A. § 745 (Supp. IV 1986), *amended by* 46 U.S.C. §§ 30904–05) (citing 50 U.S.C.A. § 1291(a) (Supp. IV 1986), *further amended by* 50 U.S.C. § 4701(a).

20. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 585 (1991).

21. Vimar Seguros y Reasaguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (finding that a bill of lading is a contract for the shipment of goods).

22. 511 U.S. 202, 204, 220–21 (1994); *see also id.* at 208–09 (discussing the alternate rules applied before the Court addressed the issue of separate settlements under maritime law) (quoting Restatement (Second) of Torts § 886A (Am. L. Inst. 1977) (amended 1979)).

23. *Id.* at 217, 221.

24. For example, in a case tried by the U.S. District Court for the Northern District of California, a Bay Area ferry operator was found responsible for the satisfaction of the entire multimillion-dollar jury verdict. This recovery likely would have been lost had the plaintiff settled with the co-defendant before trial. *See, e.g.*, Holzhauer v. Golden Gate Bridge Highway & Transp. Dist., 899 F.3d 844, 847, 851–52 (9th Cir. 2018).

E. Admiralty Law and Wrongful Death Damages

Maritime wrongful death cases also present damages rules which may differ significantly from state law, particularly California law. First, for all deaths occurring on "the high seas" (i.e., outside state territorial waters), a wrongful death plaintiff, such as a spouse or parent, will be limited to the recovery of pecuniary damages only; no damages for loss of care, comfort, or society are recoverable.[25] Additionally, the Death on the High Seas Act[26] generally does not allow for the recovery for "loss of society" by an estate in survival actions[27] or for "pre-death pain and suffering."[28] There are exceptions to these rules: For example, where the claims are filed by maritime workers (e.g., merchant seamen) or where the death occurred in state territorial waters, but a finding of admiralty jurisdiction will have a potentially profound impact on the rights of a maritime plaintiff.[29]

F. Marine Insurance Law and the Dreaded "Pay to Be Paid" Clause

While the law of marine insurance is complex and involves special rules, there is one pitfall for the land-based lawyer that is particularly dangerous. Specifically, many marine liability policies are pure indemnity policies and contain what is referred to as the "pay to be paid" provision.[30] This rule provides that the insurance company need not pay any settlement or judgment until its insured client has first paid the settlement or judgment or, more formally, the policies only "undertake to insure the assured only for what he has become liable to pay and has actually paid. . . ."[31] This clause is not usually an issue where a case is settled, and the funds are paid by the defendant and immediately reimbursed by the insurer. However, it can become a major issue with respect to judgment enforcement if the insured defendant is insolvent or does not have the funds to pay the judgment and trigger insurance

25. *See, e.g.*, Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1407 (9th Cir. 1994) (citing Death on the High Seas Act, 46 U.S.C.A. §§ 761–62, *amended by* 46 U.S.C. §§ 30302–03).

26. 46 U.S.C. §§ 30302–08.

27. Zicherman v. Korean Air Lines, Ltd., 516 U.S. 217, 231 (1996).

28. Jacobs v. N. King Shipping Co., Ltd., 180 F.3d 713, 714 (5th Cir. 1999).

29. *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 37 (1990) (limiting damages recoverable by a merchant seaman); Yamaha Motor Corp., U.S.A v. Calhoun, 516 U.S. 199, 202 (1996) (allowing the recovery of state law wrongful death damages in cases involving a non-seafarer killed in state territorial waters).

30. *See* Marquette Transp. Co., Inc. v. Zurich Am. Ins. Co., No. Civ. 04-2386, 2006 WL 851399, at *5 (E.D. La. 2006) (quoting Michel v. Am. Fire & Cas., 82 F.2d 583, 586 (5th Cir. 1936) and citing 41 AM. JUR. 2D *Indemnity* § 43 (2004)).

31. Diesel Tanker A. C. Dodge Inc. v. Stewart, 262 F. Supp. 6, 8 (S.D.N.Y 1966); *see* Cont'l Oil Co. v. Bonanza Corp., 677 F.2d 455, 459 (5th Cir. 1982).

reimbursement. There are ways to work around the issue, such as by obtaining a "letter of undertaking" from the insurer (i.e., a formal written agreement from the liability insurance company agreeing to pay any judgment directly, even if the insured defendant cannot pay, but this still requires a command of the maritime rules for arrest and attachment,[32] which again underscores the competency and risk management issues involved in handling a case under admiralty jurisdiction).

III. The Personification of the Vessel, In Rem Claims, and the Limitation of Liability Act

Finally, in the list of maritime law novelties that the average non-maritime attorney may encounter, there are two unique features of maritime law that deserve mention. One is the right of anyone with a "maritime lien" (including any injured passenger, a boatyard, or a marina with an unpaid bill) to bring an action in rem against a vessel, independent of the plaintiff's rights against any in personam defendant (such as the vessel owner).[33] This serves as a powerful remedy provided by Supplemental Admiralty Rule C of the Federal Rules of Civil Procedure, which allows a plaintiff to file an action in a U.S. District Court for an ex parte (that's right, no notice) warrant for the arrest of any responsible vessel and the right to force the sale of the vessel to satisfy the debts it has incurred.[34] This remedy is the "sister" to the right (again, ex parte) to attach a vessel (or other property) pursuant to Supplemental Admiralty Rule B, where the in personam defendant cannot be found in the federal district, but the maritime property can be found, even without a maritime lien.[35] One would be surprised how quickly boat and ship owners agree to pay their bills when the U.S. Marshals Service seizes their favorite toys (or revenue-producing assets) and tow them away to be held by the court's substitute custodian (i.e., a private entity that takes possession of the vessel and cares for it while under arrest or attachment), or even sold—prejudgment—if the debt is not paid or alternative security posted.[36]

While these remedies uniquely favor maritime plaintiffs, there is a similarly arcane defense available to maritime defendants who own vessels. Specifically, under the Limitation of Liability Act, a vessel owner (or charterer) may file a special action in federal court and limit their liability to the post-casualty value of the vessel where it can be shown that the owner did not

32. *See* discussion *infra* Part III.

33. FED. R. CIV. P. C(1).

34. FED. R. CIV. P. E(4)(a)–(b), E(9).

35. FED. R. CIV. P. B(1)(a).

36. *See* FED. R. CIV. P. E(5).

have "privity or knowledge" of the acts giving rise to vessel owner liability.[37] While subject to several important procedural requirements (for example, the owner must file their limitation action within six months of receipt of a written notice of claim), this is a critical defense available to vessel owners often missed by non-maritime counsel.[38]

Conclusion

These rules are only a few examples of the many maritime law provisions triggered by a finding of admiralty jurisdiction. However, even knowing the existence of special admiralty rules, remedies, and defenses—as well as the admiralty jurisdiction test—will go a long way toward enabling the average practitioner to spot these issues and take steps to ensure that their clients receive competent representation. Typically, such representation should involve the retention of an admiralty law specialist. There are many qualified maritime lawyers in California, and the State Bar of California has a certification for admiralty law specialization, which is a good way to confirm the knowledge and experience of any maritime lawyer retained.[39]

Lawyers are often zealous protectors of their relationships with their clients. They are bound by rules of professional conduct to handle only those matters for which they have the requisite competency.[40] Additionally, a lawyer's failure to retain a qualified maritime attorney, even on an association basis, is not only a recipe for potential disaster but also for a legal malpractice claim. This is true no matter the skill and experience level of the shoreside attorney in handling shoreside versions of similar cases.

37. 46 U.S.C. § 30523.

38. *Id.* § 30529.

39. *See Legal Specialty Areas*, STATE BAR OF CAL., https://www.calbar.ca.gov/Attorneys/Legal-Specialization/Legal-Specialty-Areas [https://perma.cc/9RU8-JRPP].

40. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).