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ADMIRALTY LAW AND PLEASURE BOATING IN NEBRASKA

I. INTRODUCTION

Pleasure boating, a relatively new phenomenon, has made a marked appearance in the recreational habits of many Americans. At the end of 1958, the number of pleasure boats in the United States was estimated at over seven million.¹ As more people take to the water, there will be an increase in nautical mishaps with a resulting increase in litigation in both federal and state courts. One would expect that the legal problems arising from pleasure boat accidents would be met with an application of state common law. However, federal admiralty or maritime law² will apply to pleasure boat accidents occurring on navigable waters of the United States.³ It will be the purpose of this article to relate some basic concepts of admiralty law, and to point out some of the problems that might be encountered in applying admiralty law to cases arising in Nebraska.

II. JURISDICTION

The United States Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction."⁴ This federal admiralty jurisdiction is made exclusive by section 1333 of the Judicial Code, which provides for exclusive jurisdiction of federal district courts over admiralty cases "saving to suitors in all cases other remedies to which they are otherwise entitled."⁵ The so called "saving clause" has been interpreted to allow nonadmiralty and admiralty courts to have concurrent jurisdiction over in personam admiralty actions.⁶ Accordingly, a plaintiff has a choice

¹ Yachting, Jan., 1958, p. 115.

² The terms "admiralty" and "maritime law" are for the most part synonymous in this country today. GILMORE & BLACK, ADMIRALTY § 1-1, at 1 (1957). The terms will be used interchangeably throughout the article.

³ See *Levinson v. Deupree*, 345 U.S. 648 (1953); *Niepert v. Cleveland Elec. Illuminating Co.*, 241 F.2d 916 (6th Cir. 1957); *King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963); *Chimene v. Dow*, 104 F. Supp. 473 (S.D. Tex. 1952); *Mays v. The Eleanor Marie*, 103 F. Supp. 271 (E.D. N.C. 1952); *Cashell v. Hart*, 143 So.2d 559 (D.C.A. Fla. 1962); *But cf.*, *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961).

⁴ U.S. CONST. art. III, § 2.

⁵ 28 U.S.C. § 1333 (1964).

⁶ See *Rounds v. Cloverport Foundry & Mach. Co.*, 237 U.S. 303 (1915); *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638 (1900); *Leon v. Galceran*, 78 U.S. (11 Wall.) 185 (1870).

between federal and state courts and even possibly between the admiralty and law sides of the federal district court.⁷

The accepted test for admiralty jurisdiction was developed in *The Plymouth*⁸ in 1866. The Court said:

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.⁹

That proposition has been frequently reiterated,¹⁰ and the Supreme Court has not chosen to re-examine it.¹¹ Therefore, the test is the location of the occurrence, rather than the basis of the cause of action under which the claim is made.

III. WHAT ARE NAVIGABLE WATERS OF THE UNITED STATES?

The navigability of a body of water for determining judicial jurisdiction under the admiralty clause will be the primary concern of this section, although a body of water may be navigable for some purposes and nonnavigable for others.¹²

When the question of jurisdiction in admiralty first came before the Supreme Court of the United States in *The Steamboat Thomas Jefferson*,¹³ the Court applied the English rule that the domain of admiralty was the ebb and flow of the tide, and refused to extend the jurisdiction of admiralty to an inland body of water. Sub-

⁷ On the other hand, where a claim asserted is in the nature of a maritime lien, enforceable in admiralty by in rem process, only the court of admiralty may take jurisdiction. See *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866); *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866). *But see* *Madruga v. Superior Court of California*, 346 U.S. 556 (1954).

⁸ 70 U.S. (3 Wall.) 20 (1865).

⁹ *Id.* at 36.

¹⁰ *E.g.*, *Hess v. United States*, 361 U.S. 314, 318 (1960); *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

¹¹ See *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

¹² See Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8, 9. Cases in the area of navigability may be grouped in classes as follows: "(a) cases of admiralty and maritime jurisdiction; (b) cases arising under the Commerce Clause; (c) cases arising under treaties; (d) cases involving citizens of different states; (e) cases arising under statutes affecting territories and new states; and (f) cases involving federal land grants."

¹³ 23 U.S. (10 Wheat.) 428 (1825).

sequently, in *The Propeller Genesee Chief v. Fitzhugh*,¹⁴ the Court repudiated the English rule and held that admiralty jurisdiction was not restricted to tide waters, but extended to all bodies of water that were capable of sustaining commerce. A significant extension of the navigability test was developed in the classic decision of *The Daniel Ball*.¹⁵ The test was stated as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress in contradistinction from navigable waters of the States, when they 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, in the customary modes in which such commerce is conducted by water.¹⁶

Further modifications on the test are:¹⁷

1. The extent and manner of commerce on the body of water is of no great significance, for the test is whether the body of water in its natural state is capable of sustaining commerce.¹⁸

2. Artificial obstructions do not preclude a body of water from being navigable, if the body of water in its natural state was capable of sustaining commerce.¹⁹

3. Navigability does not depend on the particular mode in which commerce is carried on—whether by steamboats, sailing vessels or flatboats—nor on the presence of occasional difficulties in navigation.²⁰

4. Once a waterway is judicially found to be navigable, it remains navigable.²¹

There are other cases that have further extended the navigability test for purposes of Congressional regulation under the commerce clause,²² but the test for determining navigability in ad-

¹⁴ 53 U.S. (12 How.) 443 (1851).

¹⁵ 77 U.S. (10 Wall.) 557 (1871).

¹⁶ *Id.* at 563.

¹⁷ Some of the tests listed here arose under the commerce clause but have been applied in judicial admiralty jurisdiction cases.

¹⁸ *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874).

¹⁹ *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921).

²⁰ *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

²¹ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940).

²² The test for determining navigability for Congressional regulation un-

miralty cases has not been so extended.²³ The present test for

der the commerce clause is broader than the test for navigability under the admiralty clause. Compare *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), with *United States v. Rio Grande Dam Irr. Co.*, 174 U.S. 690 (1899), where the Court held that federal control is no longer limited to navigable streams but extends to tributaries of navigable streams. See also *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) where the Court further extended federal control over water that could be made navigable with reasonable improvements. See Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NATURAL RESOURCES J. 1, 9 (1963) where the author states, "Theoretically at least, there are no waters in the United States immune from the navigation power."

Congress also has power implied from the admiralty grant in conjunction with the necessary and proper clause to regulate matters within the admiralty jurisdiction. However, this power to regulate should not be confused with the federal courts power to determine what waters are within the admiralty jurisdiction for judicial purposes. See *Panama R.R. v. Johnson*, 264 U.S. 375, 385-86 (1924); *In re Garnett*, 141 U.S. 1, 14 (1891); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575-76 (1874); *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526-27 (1861). The distinction between the Congressional power to regulate and the federal court's power to determine what waters are within the admiralty jurisdiction becomes paramount when Congress passes an act declaring a body of water nonnavigable. E.g., 41 Stat. 1105 (1921), 33 U.S.C. § 42 (1964), "The Platte River in the State of Missouri is declared to be a nonnavigable stream within the meaning of the Constitution and laws of the United States, and jurisdiction over said river is declared to be vested in the State of Missouri." It could be argued that this act would be sufficient to divest Congress of its power to regulate; however, it would not divest the federal court of its power to determine whether the body of water was navigable for admiralty judicial jurisdictional purposes. See *Panama R.R. v. Johnson*, *In re Garnett*, *The Lottawanna*, and *The Steamer St. Lawrence*, *supra*. See also *Miami Beach Jockey Club, Inc. v. Dern*, 83 F.2d 715 (D.C. Cir. 1936); *United States v. Banister Realty Co.*, 155 Fed. 583 (E.D.N.Y. 1907), where the court recognized the differences between the criteria developed in cases of admiralty jurisdiction and cases arising under the commerce clause.

²³ See *Marine Office of America v. Manion*, 241 F. Supp. 621, 622 (D. Mass. 1965); *Madole v. Johnson*, 241 F. Supp. 379, 381 (W.D. La. 1965); *Shogry v. Lewis*, 225 F. Supp. 741, 742 (W.D. Pa. 1964); *In re Madsen's Petition*, 187 F. Supp. 411, 414 (N.D.N.Y. 1960). But see *Utah v. United States*, 304 F.2d 23 (10th Cir. 1962); *Davis v. United States*, 185 F.2d 938 (9th Cir. 1950), cert. denied 340 U.S. 932 (1951); *Ingram v. Associated Pipeline Contractors*, 241 F. Supp. 4 (E.D. La. 1965); *Johnson v. Wurthman*, 227 F. Supp. 135 (D. Ore. 1964); *In re Howser*, 227 F. Supp. 81 (W.D.N.C. 1964); *Lopez v. Smith*, 145 So.2d 509 (Fla. Dist. Ct. App. 1962); *Thornhill v. Skidmore*, 227 N.Y.S.2d 793, 32 Misc. 2d 320 (Sup. Ct. 1961). See also Waite, *Pleasure Boating in a Federal Union*, 10 BUFF. L. REV. 427, 439 (1961) for a proposed future change in the admiralty test.

determining navigability is generally stated as follows: Whether the body of water where the action arose, in its natural or ordinary state, is or ever was capable of being used as a highway for commerce in the customary modes²⁴ in which such commerce is conducted by water.²⁵ Although there is agreement that this is the test, difficulty is encountered when the test is applied to different factual situations. Consequently, the peculiar circumstances of each case must be considered when determining the navigability of a particular body of water.²⁶

IV. ARE THERE ANY NAVIGABLE WATERS OF THE UNITED STATES LOCATED IN NEBRASKA?

The Missouri River, which extends along the entire eastern border of Nebraska, is a navigable body of water.²⁷ Therefore, any pleasure boat accident occurring on the river is within the admiralty jurisdiction.

The Platte River, which flows from the western extremity of the state to the eastern border, has been declared nonnavigable by the Nebraska Supreme Court on numerous occasions.²⁸ However, the Nebraska decisions would not be binding in determining the navigable status of the river for admiralty purposes. The federal navigability test would control. Accordingly, if it could be shown that the Platte River in its natural or ordinary state, is or ever was capable of being used as a highway for commerce in the customary modes in which such commerce is conducted by water, then the river would be within the admiralty jurisdiction.²⁹

The Republican River, which flows through the southern most end of the state, has also been held nonnavigable by the Nebraska

²⁴ Customary modes means the modes that were customary at the time the water was considered navigable, e.g., a court took notice of the fact that Lewis and Clark navigated the waters in keel boats. *Madole v. Johnson*, 241 F. Supp. 379, 382 (W.D. La. 1965).

²⁵ See cases cited in note 23, *supra*.

²⁶ *Madole v. Johnson*, 241 F. Supp. 379, 381 (W.D. La. 1965); *accord*, *Ingram v. Associated Pipeline Contractors*, 241 F. Supp. 4 (E.D. La. 1965).

²⁷ *Jeffers v. East Omaha Land Co.*, 134 U.S. 178, 182, 195-96 (1890); *Krumwiede v. Rose*, 177 Neb. 570, 129 N.W.2d 491 (1964).

²⁸ *Application of Central Public Power & Irr. Dist.*, 138 Neb. 742, 295 N.W. 386 (1940); *Haney v. Hewitt*, 105 Neb. 746, 181 N.W. 861 (1921); *McBride v. Whitaker*, 65 Neb. 137, 90 N.W. 966 (1902); *Wiggerhorn v. Lountz*, 23 Neb. 690, 37 N.W. 603 (1888).

²⁹ See 1 MORTON, *HISTORY OF NEBRASKA* 100, 105, 107 (1907) for historical references to commerce on the Platte River. See also Neb. Terr. Laws 6th Sess. 1859, at 191-96, where there are several references to ferry boats navigating on the Platte River.

Supreme Court.³⁰ If this river can meet the federal navigability requirements, then it could also be considered within the admiralty jurisdiction.³¹

Carter Lake, located between Iowa and Nebraska, emphasizes another area where admiralty law is applicable. It has been held that lakes which cross state boundaries, thus rendering the water capable of use for interstate transportation, are navigable waters of the United States.³² Carter Lake fits into this category and consequently is within the admiralty jurisdiction.

Lewis and Clark Lake, located on the Missouri River between Nebraska and South Dakota, is not only an interstate lake, but is also adjacent to a navigable river. Accordingly, Lewis and Clark Lake is within the admiralty jurisdiction. The above discussion is not intended to be a comprehensive coverage of all possible navigable bodies of water in Nebraska. The purpose of the discussion is merely to point out that admiralty law is applicable to Nebraska.

V. CHOICE OF LAW

Once a state or federal court has taken jurisdiction over a case in admiralty, it must then decide which law is applicable—federal or state statutory law, the maritime law, or state common law.

For most of the nineteenth century, the courts approached maritime cases as if there were two independent systems of law: the maritime law to be applied in federal admiralty courts, and the state common law to be applied in state courts.³³ In 1917 the Supreme Court in *Southern Pac. Co. v. Jensen*,³⁴ adopted the view that the admiralty clause requires a uniform application of maritime law throughout the United States, and that the maritime law is

³⁰ *Clark v. Cambridge & Arapahoe Irr. & Improvement Co.*, 45 Neb. 798, 64 N.W. 239 (1895).

³¹ It is noteworthy that the authors of the Republican River Compact, in its original form, attempted to declare the Republican River nonnavigable. The original draft was approved by Nebraska, Colorado, Kansas, and both Houses of Congress. However, the President of the United States vetoed the bill because the compact sought to withdraw the jurisdiction of the United States over the waters of the Republican River for purposes of navigation. See WITMER, DOCUMENTS ON THE USE AND CONTROL OF THE WATERS OF INTERSTATE AND INTERNATIONAL STREAMS 147-53 (1956).

³² *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1954); *Davis v. United States*, 185 F.2d 938 (9th Cir. 1950), cert. denied 340 U.S. 932 (1951).

³³ *Belden v. Chase*, 150 U.S. 674 (1893).

³⁴ 244 U.S. 205 (1917).

supreme in all maritime cases regardless of the choice of forum.³⁵ However, the law applied in federal admiralty cases since this decision has not always been the federal admiralty law. There are several instances in which admiralty courts have looked to state law for a substantive rule of law.³⁶ For example, state law is applied to wrongful death claims in admiralty because the law of admiralty has no such remedy.³⁷ The Supreme Court has developed several lines of authority as to the role of state law in admiralty. There is the gap theory—if admiralty has no rule state law can be applied. Another is the opposite of the gap theory—the absence of an admiralty rule is an occupation of the field prohibiting the use of state law. State laws that supplement an admiralty remedy can be utilized, but state laws that limit an admiralty remedy cannot.³⁸ In *Kossick v. United Fruit Co.*,³⁹ the Court recognized the confusion in this area and suggested that it was an aspect of federalism to be resolved like any other conflict between the state and the national government, by balancing the state's interest against that of the government.⁴⁰ This so called "balancing of interests" test seems to have been effectuated in the "maritime but local" doctrine. Under this doctrine, state law will be applied only if it would not disturb the policy of uniformity of maritime law.⁴¹

Thus far, the cases involving pleasure boat collisions have not adopted the "balancing of the interests" test. The decisions have turned on the location of the tort without considering whether or not a federal interest was present.⁴² It has been suggested that ad-

³⁵ This rule has since been applied in the following cases: *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1 (1945).

³⁶ For a complete discussion of the problem see Comment, 50 Nw. U.L. Rev. 677 (1955).

³⁷ *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

³⁸ See Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. Rev. 661, 701 (1963).

³⁹ 365 U.S. 731 (1961).

⁴⁰ *Id.* at 739.

⁴¹ This doctrine has permitted injured workmen to collect under state compensation acts, even though the injury occurred on navigable waters of the United States, on the theory that neither the employment of the workman nor his activities at the time of the injury had any direct relation to commerce or navigation. *Grant Smith-Porter Co. v. Rhode*, 257 U.S. 469, 477 (1921). *Compare Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) where the court held that the injury was related to commerce because the plaintiff's work enabled the ship to complete its loading for safer transportation of its cargo by water.

⁴² See cases cited in note 23, *supra*.

miralty law should not apply to pleasure boat cases because there is no commercial element involved and consequently no federal interest.⁴³ The Supreme Court has occasionally made references to this argument, but thus far has not had to face the problem squarely because commerce by water has been involved in all but one case it has decided.⁴⁴

It would seem that there are valid federal interests in pleasure boating with respect to rules of navigation, right of way, and safety equipment. Furthermore, pleasure boat accidents and activities⁴⁵ may obstruct commerce. Because pleasure boating may affect commerce, a federal interest exists and the application of the uniform maritime law to pleasure boating is warranted.

VI. CHOICE OF LAW PROBLEM IN NEBRASKA

Nebraska has enacted a statute, like many other states,⁴⁶ which poses a problem in the area of pleasure boating. This statute, commonly referred to as an imputed negligence statute, makes the owner of a boat liable for injury or damage occasioned by the negligent operation of such vessel by another party, if the other party is operating the vessel with the expressed or implied consent of the owner.⁴⁷ This state statute tends to conflict with a federal statute allowing in certain situations the owner of a vessel to limit his liability to the value of the boat.⁴⁸ Under the federal statute a boat owner may so limit his liability for property damage or personal injury claims if the accident occurred without his "privity or knowledge." "Privity or knowledge" in this context has been held in the case of individual owners to mean "some personal participation of the owner in the fault or negligence which caused or contributed to the injury."⁴⁹ In other words, under the federal statute, the owner is always liable for property damage or personal injury caused by his boat although unless some actual personal negligence is proved against the owner he may limit his liability to the value of the boat. Thus where an owner allowed his children to operate his boat and they caused a collision the father's liability was so limited since he had thoroughly trained the children to operate the

⁴³ See Stolz, *supra* note 38, at 665.

⁴⁴ *Ibid.* Cf. *Levinson v. Deupree*, 345 U.S. 648 (1952).

⁴⁵ *E.g.*, water skiing is an activity which can hamper commercial traffic.

⁴⁶ See Stolz, *supra* note 38, at 664 n.20.

⁴⁷ NEB. REV. STAT. § 81-815.16 (Supp. 1963).

⁴⁸ 49 Stat. 1478, 46 U.S.C. § 183 (1964). See also ADMIRALTY RULE 51. See generally GILMORE & BLACK, *op. cit. supra* note 2, § 10-1 at 663.

⁴⁹ *Coryell v. Phipps*, 317 U.S. 406, 410-12 (1943).

boat and thus was not negligent in entrusting it to them.⁵⁰ This of course does not limit the liability of the boat operator for his own negligence.

The state statute imposes full liability on the owner of the boat in situations where the admiralty doctrine would limit his liability. Under the Nebraska statute, the owner's consent is enough to provide for full liability and no personal negligence need be shown. If the language of some United States Supreme Court decisions is followed, the Nebraska statute would be void because of the interference with the uniformity required by admiralty law.⁵¹

VII. DISTINGUISHING FEATURES OF ADMIRALTY LAW

The difference between federal admiralty law, state common law, and federal law (apart from federal admiralty law), cannot be fully covered in this article; however, it is possible to point out some of the basic distinctions.

1. There is no right to a jury trial in admiralty.⁵²
2. Diversity of citizenship and jurisdictional amount are not required in admiralty.⁵³
3. State statutes of limitation do not apply to admiralty actions; instead, the doctrine of laches applies.⁵⁴
4. Generally, neither federal nor state rules of pleading apply to admiralty actions;⁵⁵ instead, admiralty has its own rules.⁵⁶
5. State rules as to competency of witnesses need not be followed in admiralty.⁵⁷

⁵⁰ *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951). See also *Petition of Hocking*, 158 F. Supp. 620 (D.C.N.J. 1958).

⁵¹ *E.g.*, *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). *But see* 37 TEMP. L.Q. 537, 538 (1964) where the author comes to the conclusion that limitation of liability will not have a very wide application in actions involving small pleasure boats.

⁵² ADMIRALTY RULE 46½; *King v. Testerman*, 214 F. Supp. 335 (E.D. Tenn. 1963). However, a jury trial is provided as to some actions arising on lakes or connecting navigable waters. 63 Stat. 953 (1948), 28 U.S.C. § 1873 (1952).

⁵³ *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, (1959).

⁵⁴ *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 533 (1956).

⁵⁵ See *Archawski v. Hanioti*, 350 U.S. 532 (1956); *Levinson v. Deupree*, 345 U.S. 648 (1953).

⁵⁶ See *Rules of Practice in Admiralty and Maritime Cases*, 28 U.S.C.A. § 85 (1950). See also Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 MAINE L. REV. 1 (1965). The proposed unification was transmitted to Congress on Feb. 28, 1966.

⁵⁷ *Taylor v. Crain*, 224 F.2d 237 (3d Cir. 1955).

6. State rules as to burden of proof need not be followed in admiralty.⁵⁸

7. Contract rules may be different in admiralty.⁵⁹

8. Contributory negligence is not a bar in admiralty.⁶⁰

9. There is no doctrine of assumption of risk in admiralty.⁶¹

10. The fellow servant rule is inapplicable in admiralty.⁶²

11. A defendant may limit his liability in admiralty.⁶³

12. Apart from collision cases,⁶⁴ there is no contribution between tortfeasors in admiralty.⁶⁵

13. The law of admiralty holds a boat owner to a standard of reasonable care for all visitors,⁶⁶ while the law of many states imposes different standards depending upon whether the visitor is a social or business invitee.⁶⁷

14. The scope of review in admiralty is limited.⁶⁸

This list is by no means a complete coverage of the dissimilarities between admiralty and other laws. However, the list should be sufficient to point out that practice under the law of admiralty bears little resemblance to practice under the ordinary federal and state law.

⁵⁸ See *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

⁵⁹ See Comment, 10 *STAN. L. REV.* 724, 729-30 (1958).

⁶⁰ *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *The Max Morris*, 137 U.S. 1 (1890).

⁶¹ *Bow v. Pilato*, 82 F. Supp. 399 (S.D. Cal. 1949).

⁶² *Kennedy v. Cunard S.S. Co.*, 189 N.Y. Supp. 402 (App. Div. 1921).

⁶³ *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889). See *ADMIRALTY RULE 51*; 49 Stat. 1479 (1936), 46 U.S.C. § 183-89 (1964). This doctrine has been severely criticized. *GILMORE & BLACK, op. cit. supra* note 2, § 10-13 (1957). See also 79 *HARV. L. REV.* 425 (1965) where limitation of liability was refused an insurer being sued under a direct action statute.

⁶⁴ In mutual fault collision cases the damages are divided equally without regard to degree of fault. *GILMORE & BLACK, op. cit. supra* note 67, §§ 7-4, 7-5, 7-18. This is to some extent modified by the major-minor fault doctrine. *Id.* § 7-4.

⁶⁵ *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

⁶⁶ See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629-32 (1959).

⁶⁷ See *PROSSER, TORTS* §§ 60-1 (3d ed. 1964).

⁶⁸ See *Kulack v. The Pearl Jack*, 178 F.2d 154 (6th Cir. 1949). Review is limited because finding of facts by the trial judge are conclusive unless clearly erroneous.

It is imperative that an attorney when confronted with a case involving a pleasure boat accident be fully cognizant of the procedural and substantive niceties inherent in the law of admiralty. If the pleasure boat accident occurs on a navigable body of water, any ensuing action will be tried under the maritime law. This means that the injured party has a choice as to whether the action may be brought in state or federal court. Although the institution of an action in a particular forum does not control which substantive law will govern,⁶⁹ it will control the procedural law of the case.⁷⁰ Accordingly, the plaintiff will have a choice as to whether he wants his case tried before a jury in a state court, or whether he wants the case tried to the judge in a federal admiralty court. This choice could be either advantageous or disadvantageous depending on the peculiar facts of each case. Similarly, the injured party would have the initial choice of bringing an action in a federal court without the usual requirements of diversity of citizenship and jurisdictional amount. Whether this is an advantage or not will also depend on the peculiar facts of each case. Because there are certain distinct advantages and disadvantages to trying a case under the law of admiralty, an attorney should be aware of the differences when dealing with a pleasure boat accident case.

VIII. SERVICE OF PROCESS

There are two admiralty rules dealing with service of process.⁷¹ However, neither of these rules, nor any of the other admiralty rules, specify the territorial limits effecting service of process. Therefore, the Federal Rules of Civil Procedure and rules related to state practice may be looked to for determining where a defendant is amenable to process.⁷² Federal Rule 4(f) provides that a district court may issue process anywhere within the territorial limits of the state in which the district is located. Accordingly, if a defendant is found anywhere within the state where the action is brought he may be served with process.⁷³ If the defendant is not

⁶⁹ If the action is of admiralty cognizance, admiralty law will apply regardless of the forum. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

⁷⁰ See STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 133 (3d ed. 1963).

⁷¹ ADMIRALTY RULE 1; ADMIRALTY RULE 2.

⁷² *Chilean Line Inc. v. United States*, 344 F.2d 757, 760 (2d Cir. 1965); *Patel Cotton Co. v. The Steel Traveler*, 107 F. Supp. 191, 193 (S.D. N.Y. 1952).

⁷³ FED. R. CIV. P. 4(f) also provides for service upon defendants brought in as parties pursuant to Rule 13(h), 14, or 19 at all places outside the state but within the United States that are not more than 100 miles from the place where the action is commenced.

within the state where the action is brought, then he must be served in the manner prescribed by a statute of the United States or in the manner prescribed by the law of the state in which the district court is held.⁷⁴ This provision has usually been interpreted to mean that process can be served upon a defendant who resides outside the state in which the United States District Court is sitting.⁷⁵

The usual method of obtaining service upon a nonresident is by the use of a "long arm" statute. With the aid of this legislation, a resident of a state could obtain service of process on a nonresident defendant involved in a pleasure boat accident within the state.⁷⁶

Another method of obtaining service on a nonresident is the adoption of a water craft statute. A water craft statute would in substance provide for service of process on the Secretary of State in actions against nonresident's growing out of any accident arising from the nonresident's operation, navigation, or maintenance of water craft in the state.⁷⁷ In a recent Fifth Circuit opinion, it was held that service made on a nonresident vessel owner pursuant to the Louisiana Watercraft Statute applied through Federal Rule 4(d) 7 was entirely proper.⁷⁸ A state then has two methods whereby a nonresident defendant can be amenable to process for damages arising out of pleasure boat accidents within the state. Nebraska has neither.

IX. CONCLUSION

Although the maritime law was developed under the auspices of ocean going trade and shipping, the expansion of the admiralty jurisdiction to include navigable inland waters has brought many pleasure boats within its domain. The primary objection to the application of admiralty law to pleasure boating is that it precludes

⁷⁴ FED. R. CIV. P. 4(d)7.

⁷⁵ *Wolfe v. Doucette*, 348 F.2d 635, 638-39 (9th Cir. 1965); *Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, S.A.*, 243 F.2d 342, 347-48 (2d Cir. 1957); *Giffin v. Ensign*, 234 F.2d 307, 311 (3d Cir. 1956). Some authorities have interpreted 4(f) to limit state process to service inside the state where the Federal District Court is sitting. See discussion of this view in *Wolf v. Doucette*, *supra* at 637-38.

⁷⁶ A boating accident would be a tortious act committed within the state and therefore within the meaning of the statute. See ILL. REV. STAT. ch. 110, § 17(1)b (1956).

⁷⁷ See LA. REV. STAT. ANN. §§ 13:3479-80 (1951). See also Kierr, *Use of State Statutes to Effect Service on a Non-Resident Vessel Owner*, 8 LA. B.J. 113 (1960).

⁷⁸ *S.S. Philippine Jose Abad Santos v. Bannister*, 335 F.2d 595, 598 (5th Cir. 1964).

the state legislature from passing laws in an area where local legislatures have generally been thought competent to act. In addition, it cannot be expected that Congress will be responsible to local needs in this area.⁷⁹ On the other hand, the policy behind the uniform maritime law,⁸⁰ is still as valid today as when it was adopted. Commerce on rivers, lakes, and the coastlines should not be burdened by diverse state regulations. The justification for applying federal admiralty law to pleasure boating on navigable waters lies in the fact that pleasure boating affects commerce by obstructing it with accidents and increased traffic. In addition the federal government is interested in seeing that pleasure boats follow rules of navigation and use proper safety equipment. If the states were free to pass diverse laws in this area, the unpredictability of the outcome of probable law suits would severely hinder the application of uniformity prescribed by the law of admiralty. Therefore, the continued application of admiralty law to pleasure boat cases is warranted.

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⁷⁹ See Stolz, *supra* note 38, at 664.

⁸⁰ The policy of the admiralty grant to Congress in the Constitution is indicated by Governor Randolph's address to the Virginia Constitutional Convention: "Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation, and intercourse with foreign powers may be affected by admiralty decisions; as they ought therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct jurisdictions,—this jurisdiction ought to be in the federal judiciary. . . ." 3 ELLIOTT'S DEBATES 571 (1788).